Domestic Terrorism: Overview of Federal Criminal Law and Constitutional Issues

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SUMMARY

Federal statute defines domestic terrorism to include dangerous criminal acts intended to intimidate or coerce a civilian population or to influence or affect government policy or conduct within the jurisdiction of the United States. Despite the federal statutory definition, no federal criminal provision expressly prohibits "domestic terrorism." Nevertheless, numerous federal statutes offer prosecutors options in charging violent and destructive conduct consistent with the statutory definition of domestic terrorism. Some of these statutes can be characterized as expressly focused on terrorism, listing criminal offenses to include, among others, providing material support or resources to terrorists and engaging in terrorism transcending domestic boundaries. Other generally applicable federal criminal laws may also be relevant to domestic terrorism prosecutions. For example, depending on the defendant's motive, target, or means, various federal criminal statutes protecting certain property or persons, prohibiting violence motivated by particular biases, or criminalizing possession or use of specific weapons may apply. Depending on the circumstances, prosecutors may also rely on accomplice liability or inchoate offenses such as attempt, conspiracy, or solicitation to charge conduct consistent with the definition of domestic terrorism. Beyond applicable offenses, domestic terrorism may be relevant in federal sentencing, either through specific statutes that authorize additional penalties in the domestic terrorism context or through the United States Sentencing Guidelines, which include an upward adjustment for offenses connected to terrorism.

Civil disturbances over the past year have reportedly heightened interest in laws governing domestic terrorism, a topic that has long been a matter of congressional concern. As a number of proposals introduced in the 116th and 117th Congresses reflect, Congress remains interested in additional legislation addressing domestic terrorism, and any legislative action in this area would take place against the backdrop of a broader discussion of potential policy concerns and constitutional considerations. For instance, some observers dispute whether there is a gap in the existing federal domestic terrorism legal regime that leaves some violent or destructive conduct outside the scope of federal jurisdiction, and, if so, what new criminal provisions would be required. Additionally, certain constitutional constraints, such as First Amendment protections, Fourth Amendment restrictions on government searches, and broader federalism-based limitations on federal jurisdiction, may be relevant should Congress consider new domestic terrorism law.

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Introduction

Domestic terrorism has been an issue of long-standing congressional concern.[1] Occurrences such as the events of January 6, 2021, at the U.S. Capitol—which involved some conduct that federal law enforcement described as domestic terrorism[2]—have reportedly heightened congressional interest in the federal statutory regime governing domestic terrorism.[3]

Federal statute defines domestic terrorism as:

> [A]ctivities that--
>
> **(A)** involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
>
> **(B)** appear to be intended--
>
> **(i)** to intimidate or coerce a civilian population;
>
> **(ii)** to influence the policy of a government by intimidation or coercion; or
>
> **(iii)** to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
>
> **(C)** occur primarily within the territorial jurisdiction of the United States.[4]

Although defined in federal law, there is no federal criminal provision expressly prohibiting "domestic terrorism," as the terms defining domestic terrorism are not elements of criminal offenses.[5] Conduct consistent with the definition of domestic terrorism may still be a federal

[1] *See, e.g.*, Domestic Terrorism Prevention Act of 2017, S. 2148, 115th Cong. (2017); Establishing the Select Committee on White Supremacy and Domestic Terror Movements, H.R. 515, 115th Cong. (2017); Animal Enterprise Terrorism Act, P.L. 109-374, 120 Stat. 2652 (2006); Antiterrorism Act of 1993, H.R. 1438, 103rd Cong. (1993); Terrorism Prevention and Protection Act of 1993, H.R. 1301, 103rd Cong. (1993); *see also infra*, § "Legislative Proposals."

[2] *See, e.g.*, *FBI Oversight/Current Security Threats: Hearing Before the Senate Judiciary Committee*, 117th Cong. (Mar. 2, 2021) (statement of Christopher Wray, Dir., FBI) [hereinafter FBI Oversight Hearing] (describing some conduct committed during the events of January 6 as domestic terrorism).

[3] *See, e.g.*, Greg Myre, *An Old Debate Renewed: Does The U.S. Now Need A Domestic Terrorism Law?*, NPR (Mar. 16, 2021), https://www.npr.org/2021/03/16/976430540/an-old-debate-renewed-does-the-u-s-now-need-a-domestic-terrorism-law; Karoun Demirjian, *Bipartisan Support Emerges for Domestic-Terror Bills as Experts Warn Threat May Last '10 to 20 Years'*, WASH. POST (Feb. 4, 2021), https://www.washingtonpost.com/national-security/capitol-riot-domestic-terror-legislation/2021/02/04/f43ec214-6733-11eb-8468-21bc48f07fe5_story.html; Raquel Martin, *Renewed Push in Congress to Pass Bill Targeting Domestic Terrorism*, ABC NEWS (Jan. 27, 2021), https://www.abc27.com/news/renewed-push-in-congress-to-pass-bill-targeting-domestic-terrorism/. Such events have also prompted additional focus on domestic terrorism by the Executive Branch. *See* Attorney General Merrick B. Garland, Remarks: Domestic Terrorism Policy Address (June 30, 2021), https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-remarks-domestic-terrorism-policy-address (describing DOJ strategy for countering domestic terrorism as an "effort" that "comes on the heels of another large and heinous attack – this time, the January 6th assault on our nation's Capitol"); *see generally* U.S. DEP'T OF JUSTICE, NATIONAL STRATEGY FOR COUNTERING DOMESTIC TERRORISM (June 2021).

[4] 18 U.S.C. § 2331(5). Unless noted otherwise, the term "domestic terrorism" as used in this report refers to conduct consistent with this definition. Law enforcement also use a number of other terms in contexts similar to domestic terrorism, such as "homegrown violent extremism." Additional clarification on such terminology may be found in another CRS product. *See generally* CRS Insight IN10299, *Sifting Domestic Terrorism from Hate Crime and Homegrown Violent Extremism*, by Lisa N. Sacco. Various state laws may also prohibit domestic terrorism but are beyond the scope of this report. *See* Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1333, 1353-54 (2019).

[5] CRS Legal Sidebar LSB10340, *Domestic Terrorism: Some Considerations*, by Charles Doyle.

crime, however, under numerous statutes prohibiting terrorism[6] and other types of violent or destructive conduct.[7] In addition, domestic terrorism may be relevant to the sentencing of those convicted of federal crimes.[8]

Any congressional consideration of additional legislation in the area of domestic terrorism—such as a criminal statute expressly prohibiting acts of domestic terror—would necessarily involve a broader discussion of potential policy concerns and constitutional constraints.[9] For example, some observers have debated whether a gap exists in federal criminal law leaving certain acts of domestic terrorism beyond the scope of federal jurisdiction.[10] Legislation seeking to address domestic terrorism also may implicate certain constitutional considerations, such as First Amendment protections of speech and association, Fourth Amendment restrictions on government searches, and broader federalism-based restraints on federal jurisdiction in general.[11]

This report provides an overview of federal criminal terrorism laws and analyzes the extent to which they might apply in the context of domestic terrorism. It next summarizes other generally-applicable substantive criminal laws, including inchoate offenses such as conspiracy, which might impose criminal liability for acts considered domestic terrorism. This report then briefly describes how domestic terrorism could potentially impact federal sentencing outcomes. Next, the report discusses various considerations in enacting new domestic terrorism legislation, including the extent to which there may be a gap in federal laws applicable to domestic terrorism, as well as relevant constitutional limitations on additional legislation. It concludes with an overview of select legislative proposals introduced in the 116th and 117th Congresses.

Federal Criminal Terrorism Laws

Chapter 113B of Title 18 of the U.S. Code identifies certain federal criminal offenses under the heading of "terrorism."[12] Some of the provisions in Chapter 113B expressly relate to international conduct or "foreign" terrorist organizations, but many others can apply to conduct with either an international or domestic focus.[13] Two of the principal criminal provisions in Chapter 113B

[6] *Infra*, § "Federal Criminal Terrorism Laws."

[7] *Infra*, § "Substantive Criminal Laws."

[8] *Infra*, § "Domestic Terrorism at Sentencing."

[9] *Infra*, § "Considerations for Congress."

[10] *Infra*, § "Is there a Gap in Current Law?"

[11] *Infra*, § "Constitutional Issues."

[12] As described *infra*, one of the offenses in Chapter 113B incorporates a larger list of federal crimes, many from other chapters, which are defined separately as "federal crimes of terrorism" if certain additional requirements are met. A federal crime of terrorism is defined as a listed offense that is "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." 18 U.S.C. § 2332b(g)(5)(B); *see id.* § 2339A(a) (proscribing material support in connection with listed offenses, among other things). For instance, one offense found outside of Chapter 113B and included as a federal crime of terrorism concerns attacks on mass transportation systems. *See id.* § 2332b(g)(5)(B); *id.* § 1992. Many other federal criminal statutes also may be used to prosecute conduct meeting the definition of "domestic terrorism" in 18 U.S.C. § 2331(5) or the definition of "terrorism" in 28 C.F.R. § 0.85(l) ("Terrorism includes the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."). A number of the statutes found outside Chapter 113B are addressed *infra*, § "Other Federal Criminal Laws Applicable to Domestic Terrorism." Inclusion on the list of federal crimes of terrorism has other legal implications and effects, such as constituting predicate offenses for other federal crimes like RICO violations, 18 U.S.C. § 1961(1), and extending the applicable statute of limitations. *See id.* § 3286.

[13] *E.g.*, 18 U.S.C. § 2332a (proscribing use of weapons of mass destruction); *id.* § 2339A (proscribing providing material support or resources in furtherance of certain federal crimes).

prohibit "material support," which is either (1) knowing that such support will be used or intending that such support be used to commit violations of separate federal criminal statutes associated with terrorism[14] or (2) where such support is of a designated foreign terrorist organization.[15] Additional offenses in Chapter 113B address "acts of terrorism transcending national boundaries"[16] and specific terrorism-related activities such as, among other things, possessing or using certain kinds of weapons[17] or engaging in financial transactions with governments of countries that support international terrorism.[18] This section provides an overview of the criminal offenses[19] in Chapter 113B, focusing on the provisions that proscribe material support of terrorism and terrorism transcending national boundaries.

Material Support: 18 U.S.C. §§ 2339A & 2339B

Some of the most common[20] federal charges in terrorism cases are the so-called "material support" offenses found in Sections 2339A and 2339B of Title 18 of the U.S. Code. Though both provisions use the term "material support or resources," they have substantially different requirements in terms of the objects of such support and the mental state required to commit the crime, among other things. Broadly, Section 2339A prohibits providing support for specific terrorism-related criminal *offenses*, while Section 2339B prohibits providing support to foreign terrorist *organizations*. As such, Section 2339A can apply to conduct meeting the definition of domestic terrorism, depending on the applicable offense being supported, while Section 2339B may be viewed as being limited in scope to international terrorism.[21] This report addresses both provisions for purposes of comparison.

Material Support to Terrorists Under 18 U.S.C. § 2339A

18 U.S.C. § 2339A prohibits (1) providing "material support or resources"; (2) concealing or disguising "the nature, location, source, or ownership of material support or resources"; or (3) attempting or conspiring to so provide, conceal, or disguise material support or resources; while knowing or intending that the material support or resources will be used to prepare for or carry out a violation of at least one of over fifty predicate federal offenses or to prepare for or carry out the concealment of escape from such a violation.[22] The statute defines "material support or resources" broadly as tangible or intangible property, services, or personnel (including the

[14] *Id.* § 2339A.

[15] *Id.* § 2339B.

[16] *Id.* § 2332b.

[17] *E.g.*, *id.* § 2332h.

[18] *Id.* § 2332d.

[19] Several sections of Chapter 113B address matters such as, among other things, civil remedies for victims of international terrorism, *id.* § 2333, and requests for military assistance during emergency situations involving weapons of mass destruction, *id.* § 2332e. These and other non-criminal legal matters related to terrorism are beyond the scope of this report.

[20] *See* HUMAN RIGHTS WATCH, ILLUSION OF JUSTICE: HUMAN RIGHTS ABUSES IN U.S. TERRORISM PROSECUTIONS 62-63 & n. 247 (2014), https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions (concluding that material support charges constituted largest share of convictions in terrorism cases since September 11, 2001).

[21] *See* MICHAEL GERMAN & SARA ROBINSON, BRENNAN CTR. FOR JUST., WRONG PRIORITIES ON FIGHTING TERRORISM 8 (2018), https://www.brennancenter.org/sites/default/files/2019-08/Report_Wrong_Priorities_Terrorism.pdf (describing "limited application of § 2339B to international terrorism cases").

[22] 18 U.S.C. § 2339A(a).

person providing the support)[23] and gives an inclusive list of examples such as currency, monetary instruments, financial securities, financial services, lodging, training,[24] expert advice or assistance,[25] safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, and transportation.[26] In short, Section 2339A prohibits supporting in various ways the preparation for, commission of, or concealment of escape from commission of other, specifically listed terrorism-related offenses.

As noted, the material support or resources must relate to a separate federal offense listed in the statute.[27] According to one scholar,[28] the predicate offenses in Section 2339A generally can be separated into three categories: (1) offenses "committed with particular weapons" (like explosives or nuclear weapons)[29] or "tactics historically associated with terrorism" (such as hostage taking[30]); (2) offenses where there is a "distinct federal interest" in the target of violence (e.g.,

[23] 18 U.S.C. § 2339B, which prohibits providing material support or resources to designated foreign terrorist organizations, contains a more specific definition of "personnel," but at least one court has held that that definition does not apply to Section 2339A and that providing personnel under Section 2339A includes making available or furnishing individuals (including oneself) "for the purpose of actively preparing for or carrying out the crimes prohibited by the statute through some form of coordinated action." United States v. Abu-Jihaad, 600 F. Supp. 2d 362, 400 (D. Conn. 2009); *see also* Estate of Parsons v. Palestinian Auth., 952 F. Supp. 2d 61, 68 (D.D.C. 2013) (finding *Abu-Jihaad* definition of "personnel" to be "compelling" and applying it in civil action).

[24] "Training" is separately defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." *Id.* § 2339A(b)(2). These and other definitions related to specific kinds of material support appear to have been enacted to address certain constitutional concerns, which are discussed in more detail *infra*, § "Constitutional Issues." *See also, e.g.*, Holder v. Humanitarian L. Project, 561 U.S. 1, 21 (2010) (noting "narrowing definitions" added to Section 2339A in upholding Section 2339B against constitutional challenge); United States v. Amawi, 695 F.3d 457, 482 (6th Cir. 2012) ("[A]lthough the conspiracy was closely related to, and indeed proved by, many of the defendants' conversations about political and religious matters, the conviction was based on an agreement to cooperate in the commission [of] a crime, not simply to talk about it."); United States v. Stewart, 590 F.3d 93, 115 (2d Cir. 2009) (acknowledging lack of dispute "that section 2339A may not be used to prosecute mere advocacy or other protected speech" under First Amendment but recognizing that speech integral to criminal conduct is unprotected).

[25] "Expert advice or assistance" is separately defined as "advice or assistance derived from scientific, technical or other specialized knowledge." *Id.* § 2339A(b)(3).

[26] *Id.* § 2339A(b)(1). Medicine and religious materials are excepted from the definition. *Id.* More broadly, providing material support or resources is distinct from accomplice liability for a federal offense under 18 U.S.C. § 2. That provision establishes liability for anyone who "aids, abets, counsels, commands, induces or procures" the commission of a federal crime. *Id.* § 2(a). However, one court has noted that "proving that a person provided 'material support' requires more than merely encouraging or counseling someone to commit a crime," which is all that is required for liability under Section 2. United States v. Abu Khatallah, 151 F. Supp. 3d 116, 142 (D.D.C. 2015). Accomplice liability is discussed more generally *infra*, § "Accomplice Liability."

[27] 18 U.S.C. § 2339A(a). Almost all of the separate offenses listed in Section 2339A(a) are also included in the list of "federal crimes of terrorism" in Section 2332b(g)(5)(B), which is itself mostly incorporated for purposes of Section 2339A, though there are a few differences—for example, 18 U.S.C. § 1091, addressing genocide, is included as a predicate offense in Section 2339A but is not listed as a federal crime of terrorism under 2332b(g)(5)(B). Section 2339A, and the other material support provision in Section 2339B, are also included in the list of "federal crimes of terrorism" in Section 2332b(g)(5)(B) but are excepted from incorporation as predicate offenses for purposes of material support under Section 2339A, presumably to prevent the apparent redundancy of providing material support or resources for providing material support or resources. *See id.* § 2339A(a).

[28] Sinnar, *supra* note 4.

[29] *E.g.*, 18 U.S.C. § 844(i) (proscribing malicious destruction of or damage to certain property "by means of fire or an explosive"); *id.* § 2332i (addressing acts of nuclear terrorism).

[30] *See id.* § 1203.

killing a federal employee[31] or attacking communication lines or systems[32]); and (3) offenses "with an international nexus" (such as conspiring to murder, kidnap, or maim persons abroad[33]).

At least two commentators have examined the Section 2339A predicate offenses individually and concluded that the vast majority—fifty-one, to be precise—can apply to domestic terrorism.[34] For instance, in 2018, a Florida resident mailed explosive devices to a number of government officials and public figures, ostensibly motivated by domestic political views.[35] Among many other things, he was charged with multiple counts of using a weapon of mass destruction in violation of 18 U.S.C. § 2332a,[36] which is a predicate offense listed in Section 2339A. Both the federal prosecutors and the judge in the case referred to the man's actions as "domestic terrorism."[37] Thus, assuming the predicate offense for a Section 2339A charge is one that does not require an international nexus or conduct—like Section 2332a in the preceding example—"material support" under Section 2339A can include purely domestic conduct and/or U.S.-based ideologically motivated conduct.[38]

One who provides material support or resources under Section 2339A must, in order to violate the statute, do so "knowing or intending that they are to be used" in connection with one of the listed predicate offenses.[39] This *mens rea*, or mental-state, requirement "extends both to the support itself, and to the underlying purposes for which the support is given."[40] In other words, the statute

[31] *Id.* § 1114.

[32] *Id.* § 1362.

[33] *Id.* § 956(a)(1).

[34] GERMAN & ROBINSON, *supra* note 21, at 5-6; AMY C. COLLINS, GEO. WASH. UNIV. PROGRAM ON EXTREMISM, THE NEED FOR A SPECIFIC LAW AGAINST DOMESTIC TERRORISM 12 (2020), https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/The%20Need%20for%20a%20Specific%20Law%20Against%20Domestic%20Terrorism.pdf.

[35] *See* Katie Honan, Scott Calvert & Arian Campo-Flores, *Suspect in Letter Bombs: A History of Arrests and a Prior Bomb Threat*, WALL ST. J. (Oct. 26, 2018), https://www.wsj.com/articles/suspect-in-letter-bombs-a-history-of-arrests-and-a-prior-bomb-threat-1540572060.

[36] *See* United States v. Sayoc, No. 18-CR-820, 2019 WL 1452501, at *1 (S.D.N.Y. Mar. 28, 2019) (verdict).

[37] *See* United States v. Sayoc, 388 F. Supp. 3d 300, 302 (S.D.N.Y. 2019) (imposing sentence); Press Release, Dep't of Justice, Cesar Sayoc Pleads Guilty to 65 Felonies for Mailing 16 Improvised Explosive Devices in Connection with October 2018 Domestic Terrorist Attack (Mar. 21, 2019), https://www.justice.gov/opa/pr/cesar-sayoc-pleads-guilty-65-felonies-mailing-16-improvised-explosive-devices-connection.

[38] *E.g.*, United States v. Looker, 168 F.3d 484 (4th Cir. 1998) (table op.) (involving commander of militia organization in West Virginia who discussed targets of violence in contemplated conflict between militia and federal government and ordered the manufacture of improvised explosive devices for sale to undercover FBI agent posing as broker for resale to terrorist organizations). As described *supra*, the definition of "domestic terrorism" in the U.S. Code requires that the conduct occur "primarily within the territorial jurisdiction of the United States" but does not speak to the source of the object or ideology. 18 U.S.C. § 2331(5). Thus, theoretically, even acts perpetrated in service of a foreign-influenced ideology or transnational goals could fall within the statutory definition of "domestic terrorism." *See, e.g.*, Smith *ex rel.* Smith v. Islamic Emirate of Afghanistan, 262 F. Supp. 2d 217, 221 (S.D.N.Y. 2003) ("The acts of September 11 clearly 'occurred primarily' in the United States—indeed, they occurred entirely in the United States: airplanes owned and operated by U.S. carriers took off from U.S. airports and were in route to U.S. destinations when they were hijacked and crashed into U.S. landmarks."). However, the FBI apparently views domestic terrorism as suggesting "ideological goals stemming from domestic influences, such as racial bias and anti-government sentiment." CRS Insight IN11573, *Domestic Terrorism and the Attack on the U.S. Capitol*, by Lisa N. Sacco. In any event, although Section 2339A was "designed to punish activity connected to terrorism, an association with terrorism is not an element of the crime" itself. United States v. Abu Khatallah, 151 F. Supp. 3d 116, 139 (D.D.C. 2015). Thus, "criminal liability under § 2339A attaches regardless of any linkage to terrorism," either domestic or international. *Id.*

[39] 18 U.S.C. § 2339A(a).

[40] United States v. Mehanna, 735 F.3d 32, 43 (1st Cir. 2013).

imposes "an explicit specific intent requirement to further illegal activities,"[41] meaning that the defendant must have intended, or at least known, not just that he or she was providing material support or resources but that the material support or resources would be used to facilitate a violation of one of the predicate offenses.[42]

In addition to the actual provision of material support or resources under Section 2339A, the statute proscribes attempts and conspiracies to do the same.[43] These crimes are "inchoate," meaning that they are "crimes on their way to becoming other crimes unless stopped or abandoned."[44] An attempt to violate Section 2339A requires (1) "intent to commit the object crime"[45] (i.e., providing material support or resources with the requisite mental state) and (2) "at least one substantial step toward the actual commission" of the crime.[46] So long as these elements are present, it is no defense to liability that completion of the crime would have been factually impossible—for instance, if the attempt was to provide material support or resources to what turned out to be undercover law enforcement officers.[47]

With respect to conspiracy, its "essence" is an agreement to commit an act in violation of the law.[48] Conspiracies to commit federal crimes are proscribed under 18 U.S.C. § 371, which additionally requires that at least one of the conspirators commits an "overt act" to further the conspiracy.[49] However, the conspiracy provision of Section 2339A does not carry an overt-act requirement, meaning that agreement to provide material support or resources with the requisite mental state is sufficient for liability.[50] Some of the offenses listed in Section 2339A are themselves inchoate offenses—for instance, 18 U.S.C. § 956(a)(1) proscribes conspiracies to kill, kidnap, maim, or injure persons in a foreign country.[51] Thus, Section 2339A can be used to punish a conspiracy to provide material support or resources in furtherance of a crime that is itself a conspiracy to take further unlawful action, and such a charge will not be deemed an impermissible "conspiracy to conspire."[52]

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[41] United States v. Taleb-Jedi, 566 F. Supp. 2d 157, 179 (E.D.N.Y. 2008).

[42] *Cf.* Holder v. Humanitarian L. Project, 561 U.S. 1, 17 (2010) (recognizing that Section 2339A "refer[s] to intent to further terrorist activity").

[43] 18 U.S.C. § 2339A(a).

[44] CRS Report R42001, *Attempt: An Overview of Federal Criminal Law*, by Charles Doyle. Attempt and conspiracy in relation to offenses that may be charged as domestic terrorism, as a general matter, are discussed *infra*, § "Inchoate and Accomplice Liability."

[45] United States v. Farhane, 634 F.3d 127, 145 (2d Cir. 2011) (involving attempt to provide material support or resources under Section 2339B).

[46] United States v. Mehanna, 735 F.3d 32, 53 (1st Cir. 2013).

[47] *E.g.*, United States v. Suarez, 893 F.3d 1330, 1335 (11th Cir. 2018) (involving attempt to provide material support or resources under Section 2339B).

[48] CRS Report R41223, *Federal Conspiracy Law: A Brief Overview*, by Charles Doyle.

[49] *See* 18 U.S.C. § 371 (requiring at least one of the conspirators to "do any act to effect the object of the conspiracy"); Whitfield v. United States, 543 U.S. 209, 212 (2005) (acknowledging that Section 371 "expressly includes an overt-act requirement"). An overt act is an outward, physical manifestation of intent to effect the conspiracy's object. *See Overt Act*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[50] *E.g.*, United States v. Moalin, 973 F.3d 977, 1006-07 (9th Cir. 2020). A defendant charged with conspiracy may also be charged with the substantive crime, if completed, as well as with other "reasonably foreseeable" crimes of co-conspirators committed in furtherance of the conspiracy. United States v. Henry, 984 F.3d 1343, 1355 (9th Cir. 2021) (quoting United States v. Long, 301 F.3d 1095, 1103 (9th Cir. 2002)); United States v. Abu Khatallah, 314 F. Supp. 3d 179, 188 (D.D.C. 2018).

[51] 18 U.S.C. § 956(a)(1).

[52] United States v. Stewart, 590 F.3d 93, 118-19 (2d Cir. 2009).

Violations of Section 2339A, including its attempt and conspiracy provisions, are punishable by fine, imprisonment for up to 15 years, or both.[53] If death results, punishment increases to imprisonment for any term of years or for life.[54]

Material Support to Foreign Terrorist Organizations Under 18 U.S.C. § 2339B

18 U.S.C. § 2339B bears some similarities to Section 2339A, most notably in its core proscription of providing "material support or resources" and associated definitions, but other details of the two offenses vary considerably. Section 2339B prohibits "knowingly" providing, or attempting or conspiring to provide, material support or resources "to a foreign terrorist organization."[55] Thus, the focus of the statute is not on the *use* for which the support or resources are intended (as in Section 2339A), but on the *recipient* or intended recipient.

The term "material support or resources" in Section 2339B has the same definition as under Section 2339A, including the sub-definitions of "training" and "expert advice or assistance."[56] Thus, material support or resources under Section 2339B broadly include tangible or intangible property, services, or "personnel."[57] However, Section 2339B includes additional provisions and definitions related to the proscribed conduct that have been added over time in light of concern that providing support to an organization may encompass advocacy or association protected by the Constitution.[58] Specifically, the statute stipulates that although providing personnel may include providing oneself to aid a foreign terrorist organization, personnel must be provided "to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization."[59] As such, persons "who act entirely independently of the foreign terrorist organization to advance its goals" are not considered as "working under the foreign terrorist organization's direction and control."[60] Section 2339B further makes clear that it is not to be "construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment,"[61] and the Supreme Court has recognized that consistent with First Amendment limitations, providing a "service" *to* an organization connotes activity "performed in coordination with, or at the direction of," the relevant organization.[62] Accordingly, Section 2339B does not proscribe pure political speech, independent advocacy, or "mere association" with an organization—instead, it is limited to speech or conduct coordinated with, or at least directed to, the organization itself.[63]

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[53] 18 U.S.C. § 2339A(a). Terrorism sentencing enhancements are discussed in more detail *infra*, § "Domestic Terrorism at Sentencing."

[54] 18 U.S.C. § 2339A(a).

[55] 18 U.S.C. § 2339B(a)(1). Beyond the core criminal proscription, Section 2339B addresses a number of related matters that are beyond the scope of this report, including establishing a reporting requirement for financial institutions that hold funds for a foreign terrorist organization, establishing extraterritorial jurisdiction, structuring investigations, and protecting classified information. *See id.* § 2339B(a)(2)-(f).

[56] *Id.* § 2339B(g)(4).

[57] *Id.* § 2339A(b)(1).

[58] Constitutional issues related to domestic terrorism, including First Amendment concerns, are discussed *infra*, § "Constitutional Issues."

[59] 18 U.S.C. § 2339B(h).

[60] *Id.*

[61] *Id.* § 2339B(i).

[62] Holder v. Humanitarian L. Project, 561 U.S. 1, 24 (2010) (noting that "[t]he use of the word 'to' indicates a connection between the service and the foreign group").

[63] *E.g.*, United States v. Nagi, 254 F. Supp. 3d 548, 557-58 (W.D.N.Y. 2017); United States v. Elshinawy, 228 F. Supp.

Material support or resources must be provided "to a foreign terrorist organization,"[64] and the statute defines a "terrorist organization" as an organization designated under Section 219 of the Immigration and Nationality Act.[65] That provision, codified at 8 U.S.C. § 1189, authorizes the Secretary of State to designate an organization as a foreign terrorist organization if he or she finds that (1) the organization is foreign, (2) the organization engages in terrorist activity or terrorism[66] or "retains the capability and intent to engage in terrorist activity or terrorism," and (3) "the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States."[67] The remainder of Section 1189 sets out detailed procedures for designation, its effects, amendments to a designation, revocation of a designation by the Secretary or Congress, and review of a designation by the Secretary or the courts.[68] A designation may not be challenged, however, in a criminal proceeding by a defendant who is alleged to have violated Section 2339B.[69]

Material support or resources under Section 2339B must be provided "knowingly,"[70] and a clarifying amendment passed in 2004[71] elaborates that to meet this mental-state requirement, the defendant must have knowledge that the organization (1) is a designated terrorist organization (as described in the preceding paragraph), (2) "has engaged or engages in terrorist activity," or (3) "has engaged or engages in terrorism."[72] The terms "terrorist activity" and "terrorism" are defined by reference to two separate statutes: 8 U.S.C. § 1182(a)(3)(B), which defines "terrorist activity" as "any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves" specific kinds of conduct including, among other things, hijacking or sabotage, assassination, or use of certain weapons with intent to endanger individual safety or cause substantial damage to property;[73] and 22 U.S.C. § 2656f(d)(2), which defines "terrorism" as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."[74] As it relates to the requisite mental state under Section 2339B, the import of these references is that liability depends on "knowledge about

3d 520, 536 (D. Md. 2016). Section 2339B also contains an exception to criminal liability "in connection with the term 'personnel', 'training', or 'expert advice or assistance' if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General," though approval may not be given for material support "that may be used to carry out terrorist activity." 18 U.S.C. § 2339B(j).

[64] *Id.* § 2339B(a)(1).

[65] *Id.* § 2339B(g)(6).

[66] The terms "terrorist activity" and "terrorism" are defined in separate statutes, as described *infra*.

[67] 8 U.S.C. § 1189(a). The statute requires consultation with the Secretary of the Treasury and the Attorney General. *Id.* § 1189(d)(4).

[68] *See id.* § 1189(a)(2)-(c).

[69] *See* United States v. Ali, 799 F.3d 1008, 1019 (8th Cir. 2015); United States v. Afshari, 426 F.3d 1150, 1155 (9th Cir. 2005).

[70] 18 U.S.C. § 2339B(a)(1).

[71] Holder v. Humanitarian L. Project, 561 U.S. 1, 12 (2010).

[72] 18 U.S.C. § 2339B(a)(1).

[73] 8 U.S.C. § 1182(a)(3)(B)(iii)(I)-(VI). The same statute separately defines the term "engage in terrorist activity" as participation in terrorist activity in various ways, e.g., preparing or planning it, soliciting funds or other things of value for it, or gathering information on particular targets for it. *Id.* § 1182(a)(3)(B)(iv).

[74] 22 U.S.C. § 2656f(d)(2).

the organization's connection to terrorism," but "specific intent to further the organization's terrorist activities" is *not* required.[75]

As with Section 2339A, Section 2339B also criminalizes attempts and conspiracies to provide material support or resources, and the requirements are similar.[76] Violations of Section 2339B's material support proscription, including through attempt or conspiracy, are punishable by fine, imprisonment for up to 20 years, or both.[77] If death results, however, punishment increases to imprisonment for any term of years or for life.[78]

Terrorism Transcending National Boundaries: 18 U.S.C. § 2332b

Prohibited Acts and Penalties

18 U.S.C. § 2332b proscribes specific kinds of violent acts and damage to property within the United States where "conduct transcending national boundaries" is involved and certain jurisdictional prerequisites are met.[79] The statute imposes criminal penalties for (1) killing, kidnapping, maiming, committing an assault resulting in serious bodily injury, or assaulting with a dangerous weapon any person within the United States; or (2) creating a "substantial risk of serious bodily injury to any other person" by destroying, damaging, or attempting or conspiring to destroy or damage property within the United States, where either (1) or (2) is committed "in violation of the laws" of a state or the United States.[80] These proscriptions apply only when "conduct transcending national boundaries" is involved and at least one of six jurisdictional circumstances, such as a connection to interstate or foreign commerce, is present.[81] Threats, attempts, and conspiracies to violate the substantive provisions of Section 2332b are also prohibited.[82]

Reported cases involving Section 2332b offenses are relatively few, and thus there is little judicial guidance on many of the statutory elements.[83] That said, although Section 2332b is sometimes

[75] *Holder*, 561 U.S. at 16-17.

[76] *See supra* notes 43-52 and accompanying text.

[77] 18 U.S.C. § 2339B(a)(1). Terrorism sentencing enhancements are discussed in more detail *infra*, § "Domestic Terrorism at Sentencing."

[78] 18 U.S.C. § 2339B(a)(1).

[79] *Id.* § 2332b(a)(1).

[80] *Id.* It appears that the "in violation of the laws" requirement calls for identification of a separate federal or state criminal provision that the killing or other identified conduct violates. *E.g.*, Superseding Information at 2, United States v. Arbabsiar, No. 11-CR-897 (S.D.N.Y. Oct. 17, 2012) (specifically referencing 18 U.S.C. § 1116). A separate subsection of Section 2332b supports this reading by clarifying that when a prosecution "is based upon the adoption of State law, only the elements of the offense under State law, and not any provisions pertaining to criminal procedure or evidence, are adopted." 18 U.S.C. § 2332b(d)(2).

[81] 18 U.S.C. §§ 2332b(a)(1), (b).

[82] *Id.* § 2332b(a)(2). The separate proscription regarding attempt and conspiracy creates an oddity, and perhaps redundancy, with respect to Section (a)(1)(B), as that provision prohibits creating a substantial risk of serious bodily injury by destroying, damaging, *or* attempting or conspiring to destroy or damage property. *Id.* § 2332b(a)(1)(B). Thus, read together, the provisions appear to prohibit, among other things, attempting or conspiring to create a substantial risk of serious bodily injury by attempting or conspiring to destroy or damage property. It appears that in at least one case, federal prosecutors charged violations of both Section (a)(1)(B) and Section (a)(2) based on a solo plot to blow up a courthouse, though the Section (a)(2) charge may have been based on a threat the defendant made regarding the plot. *See* United States v. Nesgoda, 199 F. App'x 114, 115 (3d Cir. 2006) (unpublished).

[83] Beyond the offenses described, Section 2332b contains other provisions addressing extraterritorial jurisdiction, investigative authority, and the definition of a list of "federal crimes of terrorism" that have legal implications

characterized as an "international terrorism" provision,[84] it appears that its offenses may encompass conduct meeting the statutory definition of "domestic terrorism" in the sense that they address acts dangerous to human life, in violation of state or federal criminal law, that may be intended to intimidate civilians or influence or affect the policy or conduct of a government[85] and occur "primarily within the territorial jurisdiction of the United States."[86] In this last respect, Section 2332b defines "conduct transcending national boundaries" to mean "conduct occurring outside of the United States in addition to the conduct occurring in the United States,"[87] but at least one case involving a conspiracy under Section 2332b(a)(2) appears to support a fairly limited reading of that requirement. In *United States v. Wright*, a U.S. resident was charged under Section 2332b's conspiracy provision based on his participation in a plot to, among other things, kill a U.S. citizen within the United States for insulting the Prophet Mohammed.[88] The "conduct transcending national boundaries" in the case was primarily a co-conspirator's exchange of information online with someone located outside the United States.[89] The defendant argued that "mere communications" were insufficient to meet the statutory element of conduct transcending national boundaries because such conduct must be criminal, but the trial court disagreed,[90] and the U.S. Court of Appeals for the First Circuit affirmed.[91] The appellate court stated that even assuming the requisite conduct must be "substantial" to constitute conduct transcending national boundaries, the foreign resident's provision to the co-conspirator of "research and guidance on the plot to kill" the U.S. citizen sufficed.[92]

It is not clear whether a defendant must know of conduct transcending national boundaries to violate Section 2332b, so long as such conduct occurs. The statute states that proof of "knowledge by any defendant of a jurisdictional base alleged in the indictment is not required,"[93] and in *Wright*, the trial court treated the phrase "involving conduct transcending national boundaries" as establishing only a jurisdictional element for which no proof of mental state was necessary.[94] That said, the appellate court in the case appeared to assume that at least knowledge of the conduct transcending national boundaries was required.[95]

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addressed elsewhere in this report.

[84] *E.g.*, Harry Litman, *A Domestic Terrorism Statute Doesn't Exist. Congress Must Pass One app Now*, WASH. POST (Aug. 5, 2019), https://www.washingtonpost.com/opinions/2019/08/05/domestic-terrorism-statute-doesnt-exist-congress-must-pass-one-now/ ("18 U.S. Code § 2332b lays out a laundry list of 'acts of terrorism transcending national boundaries,'—i.e., acts of international terrorism—with commensurately serious penalties, including sentences of death.").

[85] A violation of Section 2332b does not depend on any particular ideological motive, and thus a purpose to intimidate civilians or impact a government could underlie conduct charged in a Section 2332b case but would not be required.

[86] 18 U.S.C. § 2331(5).

[87] *Id.* § 2332b(g)(1).

[88] 285 F. Supp. 3d 443, 447-49 (D. Mass. 2018).

[89] *Id.* at 459-60.

[90] *Id.* at 460.

[91] United States v. Wright, 937 F.3d 8, 33 (1st Cir. 2019).

[92] *Id.*

[93] 18 U.S.C. § 2332b(d)(1). Proof of *mens rea* (a requisite mental state) is undoubtedly required with respect to the non-jurisdictional conduct prohibited in Section 2332b. *See, e.g.*, Staples v. United States, 511 U.S. 600, 605 (1994) ("[S]ilence . . . by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal.").

[94] 285 F. Supp. 3d at 460. Regardless, the trial court determined that "[t]he evidence presented at trial showed that [the defendant] and his coconspirators knew that the conspiracy involved conduct that transcended national boundaries." *Id.*

[95] 937 F.3d at 37 (finding no "clear and obvious" error in the jury instruction regarding what Wright "needed to 'know

Maximum penalties for violations of Section 2332b depend on the conduct involved. If a death results, the death penalty or imprisonment for up to life is authorized.[96] Kidnapping is punishable by up to life in prison, maiming by up to 35 years, assault with a dangerous weapon or resulting in serious bodily injury by up to 30 years, destruction of property by up to 25 years, attempt or conspiracy by up to the maximum punishment applicable for a completed offense, and threat by up to 10 years.[97]

Definition of "Federal Crime of Terrorism" in § 2332b(g)

Separate from the offense established in Section 2332b, the statute also defines a list of over fifty federal offenses (including the Section 2332b offense) that are "federal crime[s] of terrorism" if "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct."[98] Some of the listed offenses are those found in Chapter 113B itself, while others are in different chapters of Title 18 or other titles of the U.S. Code.[99] Although located in the statutory section denominated "[a]cts of terrorism transcending national boundaries," the definition does not require that a listed offense with the requisite purpose involve transnational conduct in order to be considered a "federal crime of terrorism."[100] Section 2332b also does not establish separate criminal penalties for "federal crimes of terrorism," but the definition is used for other purposes—notably, (1) the Attorney General is given primary investigative responsibility for all "federal crimes of terrorism,"[101] (2) the listed offenses are incorporated as predicate offenses under the "material support" provision in Section 2339A,[102] and (3) the term is incorporated in an adjustment under the U.S. Sentencing Guidelines that can increase a Guidelines sentence range if the offense at issue involved or sought to promote a "federal crime of terrorism."[103] The latter two aspects of the "federal crime of terrorism" definition are discussed in the separate sections of this report addressing those topics.

Remaining Chapter 113B Offenses

Beyond the three broader "material support" and "transcending national boundaries" terrorism offenses in Chapter 113B, the remaining offenses address specific kinds of conduct such as using particular weapons or providing financing in service of terrorist acts. Some of these other Chapter

specifically,'" and no error in the court's instruction that the government had to establish that "Wright 'reasonably understood that he was engaged in a conspiracy to do conduct that transcends national boundaries'"). Because *Wright* involved a conspiracy, it was not disputed that the defendant had to have the "specific intent" to accomplish the object of the conspiracy. *Id.* at 36.

[96] 18 U.S.C. § 2332b(c)(1)(A).

[97] *Id.* §§ 2332b(c)(1)(B)-(G). Probation is prohibited, and a term of imprisonment under Section 2332b must run consecutive to any other term of imprisonment. *Id.* § 2332b(c)(2). Terrorism sentencing enhancements are discussed in more detail *infra*, § "Domestic Terrorism at Sentencing."

[98] *Id.* § 2332b(g)(5).

[99] A number of offenses outside of Chapter 113B that are defined as "federal crimes of terrorism" and can apply to domestic terrorism are discussed *infra*, § "Other Federal Criminal Laws Applicable to Domestic Terrorism."

[100] United States v. Salim, 549 F.3d 67, 79 (2d Cir. 2008). That said, the listed offenses may themselves bear a transnational conduct element or otherwise include an international component.

[101] 18 U.S.C. § 2332b(f).

[102] *Id.* § 2339A(a). Exception is made for the "material support" provisions in Sections 2339A and 2339B, apparently to avoid redundancy. *Id.*

[103] U.S. SENT'G GUIDELINES MANUAL § 3A1.4 (U.S. SENT'G COMM'N 2018).

113B offenses have limitations making them applicable only to international terrorism or conduct abroad, but many may be applicable, at least in part, to domestic-focused conduct.

In the former category, 18 U.S.C. § 2332 proscribes homicide (as well as attempt and conspiracy) and other violent acts outside the United States against U.S. nationals, where the Attorney General or a high-ranking subordinate certifies that the offense was "intended to coerce, intimidate, or retaliate against a government or a civilian population."[104] Section 2332d prohibits a U.S. person from engaging in a financial transaction with the government of a country designated as "supporting international terrorism," if the person knows or has reasonable cause to know that the country is so designated.[105] Section 2332f prohibits bombing public spaces, government or infrastructure facilities, or public transportation systems with intent to cause death, serious bodily injury, or extensive destruction likely to result in major economic loss.[106] A lengthy list of jurisdictional prerequisites in Section 2332f makes clear that if the offense takes place in the United States, there must be some link to a foreign state or foreign national or stateless person, or a perpetrator must be found outside the United States.[107] Finally, Section 2339D makes it a crime to knowingly receive "military-type training"[108] from or on behalf of an organization designated at that time as a foreign terrorist organization, provided at least one of a number of jurisdictional prerequisites is met.[109] Designation is made under the same authorities previously discussed in connection with Section 2339B, and the mental state requirement is the same as well—i.e., a person must have knowledge that the organization is either so designated, has engaged or engages in terrorist activity, or has engaged or engages in terrorism, as defined under separate legal provisions.[110]

[104] 18 U.S.C. § 2332(a)-(d).

[105] *Id*. § 2332d(a).

[106] *Id*. § 2332f(a)(1). The specific conduct prohibited is unlawfully delivering, placing, discharging, or detonating an explosive or other lethal device in, into, or against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility. *Id*. Attempts and conspiracies are also proscribed. *Id*. § 2332f(a)(2). Beyond the exception noted in footnote 107, *infra*, additional exception is made for activities of armed forces during armed conflict and activities undertaken by military forces in the exercise of official duties. *Id*. § 2332f(d)(1)-(2).

[107] The one jurisdictional prerequisite that potentially could apply to purely domestic-focused conduct is that the offense occurs in the United States and "is committed in an attempt to compel . . . the United States to do or abstain from doing any act." *Id*. § 2332f(b)(1)(B). However, even then, a separate exception states that, among other things, Section 2332f does not apply to offenses committed within the United States "where the alleged offender and the victims are United States citizens and the alleged offender is found in the United States." *Id*. § 2332f(d)(3). That said, conduct that takes place in the United States and may meet the statutory definition of domestic terrorism can still come within the purview of Section 2332f if the offender or at least one victim is a foreign national and the offense has a substantial effect on interstate or foreign commerce. *See, e.g.*, Indictment (Original & Last Amended/Superseded), United States v. Tsarnaev, 968 F.3d 24 (1st Cir. 2020) (No. 16-6001), 2013 WL 3215742 (in case involving domestic bombing by naturalized U.S. citizen, alleging that a victim was a national of another country and the offense had a substantial effect on interstate and foreign commerce).

[108] Military-type training is defined as including "training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly" of explosives, firearms, or "other weapons" such as weapons of mass destruction. *Id*. § 2339D(c)(1).

[109] *Id*. § 2339D(a)-(b).

[110] *See id*. § 2339D(a); *supra* notes 64-75 and accompanying text.

In the latter category, Sections 2332a, 2332g, and 2332h largely prohibit the use of weapons of mass destruction (WMDs),[111] missile systems designed to destroy aircraft,[112] and radiological dispersal devices, respectively.[113] Section 2332i restricts possession or use of radioactive material and radioactive/radiation-emitting/nuclear explosive devices with intent to cause certain harms or to compel the acts of others.[114] All of these offenses require that at least one of a number of jurisdictional prerequisites is present, and while many of the prerequisites address conditions existing or directed outside the United States, others relate to domestic-focused circumstances—for instance, 2332a, 2332g, and 2332h can apply domestically if a connection to interstate commerce exists,[115] and Section 2332i jurisdiction exists if the prohibited conduct simply takes place in the United States,[116] among many other things. Likewise, Section 2339 prohibits harboring or concealing a person that the offender knows, or has reasonable grounds to believe, has committed or is about to commit one of several listed offenses that can apply domestically, such as arson and bombing of government property risking or causing injury or death (18 U.S.C.

[111] 18 U.S.C. § 2332a. Use of WMDs against persons or property "without lawful authority," as well as threats, attempts, and conspiracies to do the same, are prohibited. *Id.* § 2332a(a). One federal appellate court has described the "without lawful authority" element as being "intended to except persons who are authorized by the appropriate authorities to use hazardous biological agents for legitimate purposes." United States v. Wise, 221 F.3d 140, 149 (5th Cir. 2000). A WMD is defined as a destructive device (including a bomb, grenade, mine, certain rockets and missiles, and similar devices); any weapon designed or intended to cause death or serious bodily injury through toxic or poisonous chemicals or precursors; any weapon involving a biological agent, toxin, or vector; or any weapon that is designed to release radiation or radioactivity at a level dangerous to human life. 18 U.S.C. § 2332a(c)(2). Other criminal prohibitions listed as "federal crimes of terrorism" but found outside of Chapter 113B can also apply to similar kinds of weapons or substances. *See, e.g.*, 18 U.S.C. § 175(a) (prohibiting knowing development, production, stockpiling, transfer, acquisition, retention, or possession of "any biological agent, toxin, or delivery system for use as a weapon").

[112] Specifically, the statute prohibits knowingly producing, constructing, otherwise acquiring, transferring, receiving, possessing, importing or exporting, using, or possessing and threatening to use an explosive or incendiary rocket or missile designed to destroy aircraft (unless not designed for use as a weapon), a device for launching such a rocket or missile, or any part to be used in assembling the same. *Id.* § 2332g(a)(1)-(2). Attempts and conspiracies are also proscribed. *Id.* § 2332g(c)(1). Exception is made for federal or state government conduct and conduct pursuant to the terms of a government contract. *Id.* § 2332g(a)(3).

[113] The provision prohibits knowingly producing, constructing, otherwise acquiring, transferring, receiving, possessing, importing or exporting, using, or possessing and threatening to use weapons, devices, or objects that are designed or intended to release radiation or radioactivity at a level dangerous to human life or that can endanger human life through release of the same. *Id.* § 2332h(a)(1). Attempts and conspiracies are also proscribed. *Id.* § 2332h(c)(1). Exception is made for federal government conduct or conduct pursuant to the terms of a federal government contract. *Id.* § 2332h(a)(2).

[114] Specifically, the statute prohibits knowingly and unlawfully (1) possessing radioactive material or making or possessing a "device" with intent to cause death, serious bodily injury, or substantial damage to property or the environment; or (2) using radioactive material or a "device" or causing certain radioactive risk or releases from a nuclear facility with intent to cause death, serious bodily injury, or substantial damage to property or the environment (or knowing that the same is likely) or to compel a person, international organization, or country to act or refrain from acting. *Id.* § 2332i(a)(1). A "device" is defined separately as a nuclear explosive device or radioactive material dispersal or radiation-emitting device that may cause death, serious bodily injury or substantial damage to property or the environment. *Id.* § 2332i(e)(2). A threat to do any of the above "under circumstances in which the threat may reasonably be believed" or a demand to possess or access radioactive material, a device, or a nuclear facility by threat or use of force are also proscribed, as are attempts and conspiracies. *Id.* § 2332i(a)(2)-(3). Exception is made for the activities of armed forces during armed conflict and activities undertaken by military forces in the exercise of official duties. *Id.* § 2332i(d).

[115] *See id.* § 2332a(a)(2) (prohibition applies against persons or property within the United States if one of several links to interstate or foreign commerce exists); *id.* § 2332g(b)(1) (jurisdiction exists if offense occurs in or affects interstate or foreign commerce); *id.* § 2332h(b)(1) (same).

[116] *Id.* § 2332i(b)(1).

§ 844(f), discussed *infra*) or using a WMD (18 U.S.C. § 2332a, discussed *supra*).[117] Lastly, Section 2339C prohibits "unlawfully and willfully"[118] providing or collecting funds with the intention or knowledge that such funds will be used to carry out either (1) an act in violation of certain international treaties, or (2) any other act intended to cause death or serious bodily injury to a civilian, or to a person not taking active part in the hostilities in a situation of armed conflict, when the purpose of the act "by its nature or context" is to intimidate a population or compel a government or international organization to act or refrain from acting.[119] Among other circumstances giving rise to jurisdiction over the offense, jurisdiction exists if the offense takes place in the United States and is directed toward or results in carrying out a predicate act (i.e., an act in violation of one of the specified treaties or intended to cause death or serious bodily injury with the stated conditions) also within the United States, so long as either the offense or predicate act bears a sufficient connection to interstate commerce.[120]

Other Federal Criminal Laws Applicable to Domestic Terrorism

As discussed above, some, but not all, federal criminal laws that expressly address terrorism can apply in the context of *domestic* terrorism.[121] Additionally, depending on the circumstances, conduct that fits within the legal definition of domestic terrorism could violate any number of generally applicable federal criminal laws ranging from hate crime statutes to provisions protecting government property. General principles of inchoate and accomplice liability may also expand the reach of these laws and the terrorism-specific statutes discussed previously. Finally, performing acts connected to or considered to be domestic terrorism can impact the *sentence* imposed for committing these and other federal offenses.

Substantive Criminal Laws

Some observers estimate that dozens of federal criminal statutes could apply to domestic terrorism,[122] and it is possible to envision examples of domestic terrorism that might violate

[117] *Id.* § 2339(a).

[118] One court has noted that the term "unlawfully" is meant to "embody common law defenses." N.Y. Times Co. v. DOJ, 756 F.3d 100, 126 n.10 (2d Cir. 2014) (reviewing legislative history). Caselaw appears to provide little elaboration on the term "willfully" as used in Section 2339C, and the word is a "notoriously slippery" one in general. United States v. Starnes, 583 F.3d 196, 210 (3d Cir. 2009) (quoting United States v. Ladish Malting Co., 135 F.3d 484, 487-88 (7th Cir. 1998)). In an unpublished opinion, one court suggested in passing that the standard of "unlawfully and willfully" in Section 2339C is "arguably higher" than knowledge. Hussein v. Dahabshiil Transfer Servs. Ltd., 705 F. App'x 40, 41 (2d Cir. 2017) (summary order).

[119] *Id.* § 2339C(a)(1). It is not necessary that the so-called predicate act for which funds are collected or provided actually occur. *Id.* § 2339C(a)(3). Attempts and conspiracies are also proscribed. *Id.* § 2339C(a)(2). Separately, Section 2339 prohibits knowingly *concealing* funds, proceeds, or "material support or resources" knowing or intending that they are or were provided or collected in violation of Section 2339C or, in the case of material support or resources, in violation of Section 2339B (addressing support to foreign terrorist organizations, discussed *supra*).

[120] *Id.* § 2339C(b)(1)(G)(ii). Other domestic-focused jurisdictional circumstances exist, such as when a predicate act seeks to compel the United States to do or abstain from doing any act. *Id.* § 2339C(b)(5).

[121] *Supra*, § "Federal Criminal Terrorism Laws."

[122] *See* GERMAN & ROBINSON, *supra* note 21, at 6-7, 10-12.

tangentially-relevant criminal laws.[123] Given the large number of federal criminal laws,[124] a comprehensive review is beyond the scope of this report. Instead, this section overviews the basic categories of federal statutes that could implicitly criminalize acts of domestic terrorism,[125] including:

- Crimes of violent unrest,
- Crimes against government authority,
- Crimes against persons,
- Crimes involving infrastructure or federal property,
- Hate crimes,
- Crimes involving specific weapons,
- Crimes involving threats, and
- Crimes involving computers.

Acts of domestic terrorism, however, may not fit neatly within a single category. In the past, acts of domestic terrorism have resulted in charges under multiple statutes[126]—and many relevant statutes could plausibly fall within multiple categories.[127] But the categories provide clarity and illustrate how underlying conduct may inform federal prosecutors' selection of charges, and the broader designation of the crime.[128] For example, the choice of statute might depend on, among

[123] For example, according to analysis by one observer, DOJ used a statute prohibiting "manufacturing, distributing or dispensing a controlled substance" as the lead charge in four domestic terrorism prosecutions between the 2013 and 2017 financial years. *Id.* at 10.

[124] *See* John G. Malcolm, *Morally Innocent, Legally Guilty: The Case for Mens Rea Reform*, 18 FEDERALIST SOC'Y REV. 40, 41 (2017) (estimating that there are approximately 5,000 federal statutes carrying criminal penalties). This number does not include federal regulations that implicate criminal penalties, which may number over 300,000. *Id.*

[125] Other statutes might be used to target *groups* engaged in domestic terrorism more generally. For example, some observers have suggested that the Racketeer Influenced and Corrupt Organizations Act (RICO)—often associated with prosecutions in the organized crime context—may be useful in prosecuting groups engaged in domestic terrorism. *See, e.g.*, Francesca Laguardia, *Considering A Domestic Terrorism Statute and Its Alternatives*, 114 NW. U. L. REV. 1061, 1093 (2020) ("The possibility of using RICO, . . . the organized crime law enforcement powerhouse, to pursue terrorists, has been floated in legal scholarship since at least 1990."). For more information on RICO see generally CRS Report 96-950, *RICO: A Brief Sketch*, by Charles Doyle. Statutes criminalizing financial crimes such as money laundering could also potentially be applicable to certain aspects of the financing of domestic terrorism. *See generally* CRS Testimony TE10056, *A Persistent and Evolving Threat: An Examination of the Financing of Domestic Terrorism and Extremism*, by Rena S. Miller. For legal analysis of money laundering statutes see generally CRS Report RL33315, *Money Laundering: An Overview of 18 U.S.C. § 1956 and Related Federal Criminal Law*, by Charles Doyle.

[126] For example, in connection with an incident described by DOJ as a domestic terrorist attack, prosecutors charged one individual under several statutes, including those prohibiting interstate transportation or receipt of explosives, interstate threats, and illegal mailing of explosives. Press Release, U.S. Dep't of Justice, Cesar Sayoc Pleads Guilty to 65 Felonies for Mailing 16 Improvised Explosive Devices in Connection with October 2018 Domestic Terrorist Attack (Mar. 21, 2019), https://www.justice.gov/opa/pr/cesar-sayoc-pleads-guilty-65-felonies-mailing-16-improvised-explosive-devices-connection [hereinafter Sayoc Plea Press Release]; Press Release, U.S. Dep't of Justice, Cesar Altieri Sayoc Charged in 30-Count Indictment With Mailing Improvised Explosive Devices in Connection With Domestic Terrorist Attack (Nov. 9, 2018), https://www.justice.gov/opa/pr/cesar-altieri-sayoc-charged-30-count-indictment-mailing-improvised-explosive-devices.

[127] *E.g.*, 18 U.S.C. § 175 (restricting use of *specific weapons* (biological agents) and prohibiting certain *threats* involving them (§ 175 is a predicate offense for 18 U.S.C. § 2339A discussed above)); *id.* § 245(b)(2) (prohibiting certain *hate crimes* and authorizing increased penalties where defendant uses *specific weapon* (dangerous weapons) in committing hate crime); *id.* § 247 (prohibiting various *hate crimes* and protecting both certain *persons* and *property*); 49 U.S.C. § 46505 (criminalizing certain conduct involving *specific weapons* (firearms or explosives) when it involves *infrastructure* (aircraft) (§§ 46505(b)(3) and (c) are predicate offenses for 18 U.S.C. § 2339A discussed above)).

[128] *See, e.g.*, *FBI Oversight Hearing*, *supra* note 2 (statement of Christopher Wray, Dir., FBI) ("We [the FBI] focus on

other things,[129] the weapon used by the defendant (*e.g.*, biological agents under 18 U.S.C. § 175),[130] the target selected (*e.g.*, federal property under 18 U.S.C. § 1361),[131] or the defendant's motive (*e.g.*, bias against the victim's race under 18 U.S.C. § 249(a)(1)).[132] Relatedly, such circumstances may also determine whether there is federal jurisdiction, rather than state or local, to investigate or prosecute conduct that could be described as domestic terrorism.[133]

Crimes of Violent Unrest

In recent months, high-ranking law enforcement officials have expressed concern over the possible intersection of domestic terrorism and violent unrest, such as rioting and other destructive mob behavior.[134] For example, in a March 2, 2021 Senate Judiciary Hearing, Federal Bureau of Investigation (FBI) Director Christopher Wray described some of the conduct committed during the events of January 6, 2021 at the U.S. Capitol—such as the breaching of Capitol grounds and "violence against law enforcement"—as domestic terrorism.[135] According to Wray, the incident involved lawful protesters, as well as individuals who came to "be part of a peaceful protest" but who engaged in "low-level criminal behavior" after being "swept up in . . . motive or emotion."[136] Law enforcement officials have indicated that the events of January 6 illustrate the potential for domestic terrorists to use social unrest as a weapon, by "turning large groups of people to violence."[137] As such, there are a number of federal criminal statutes that could be relevant when individuals participate in violent unrest, including the federal anti-riot act and civil disorder statute. This section discusses both in turn.

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the violence and the violation of federal law. And then the ideology comes into it as a further piece of the puzzle as we build up the case.").

[129] For example, DOJ policy is generally to charge the most serious applicable offense, although typically "a defendant will have committed more than one criminal act and his/her conduct may be prosecuted under more than one statute." DOJ Manual: Criminal §§ 9-27.300, https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.300.

[130] *See* Sinnar, *supra* note 4, at 1352 (explaining how the weapon used by a suspect may impact charging decisions in domestic terrorism context).

[131] *See, e.g.*, Debra Cassens Weiss, *9th Circuit upholds part of federal anti-riot law in case against white supremacists*, ABA JOURNAL (Mar. 5, 2021), https://www.abajournal.com/news/article/9th-circuit-upholds-part-of-federal-anti-riot-law-in-case-against-white-supremacists (speculating that because the events of January 6, 2021 at the Capitol "took place on federal property and involved federal personnel," the "government hasn't had to use the [anti-riot act] against people who participated" in the events).

[132] *See, e.g.*, *Hate Crimes*, FBI, https://www.fbi.gov/investigate/civil-rights/hate-crimes (last visited Mar. 29, 2021) (explaining how "an added element of bias" may turn a "traditional offense like murder, arson, or vandalism" into a hate crime).

[133] *See generally*, *What We Investigate*, FBI, https://www.fbi.gov/investigate (last visited Apr. 7, 2021).

[134] *See, e.g.*, Press Release, U.S. Dep't of Justice, Attorney General William P. Barr's Statement on Riots and Domestic Terrorism (May 31, 2020), https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-riots-and-domestic-terrorism (describing certain violence connected to rioting as domestic terrorism and stating that "the voices of peaceful and legitimate protests have been hijacked by violent radical extremists").

[135] *See, e.g.*, *FBI Oversight Hearing*, *supra* note 2 (statement of Christopher Wray, Dir., FBI).

[136] *Id.*

[137] Lisa Desjardins, *FBI director sounds the alarm on the growing threat of domestic terrorism*, PBS (Mar. 2, 2021), https://www.pbs.org/newshour/show/fbi-director-sounds-the-alarm-on-the-growing-threat-of-domestic-terrorism.

Anti-Riot Act: 18 U.S.C. § 2101

The anti-riot act, 18 U.S.C. § 2101, has been used to prosecute conduct such as looting, setting fires, distributing explosives,[138] and assaulting protestors[139] at rallies or demonstrations. Section 2101 imposes fines and up to five years of imprisonment for traveling in, or using a facility of, interstate commerce with intent to do one of four activities: (1) incite a riot, (2) organize, promote, encourage, or participate in, or carry on a riot, (3) commit any act of violence in furtherance of a riot, or (4) aid or abet any person in such activities.[140] The statute defines riots as "a public disturbance involving" violent acts, or certain threats of violence, by at least one individual who is "part of an assemblage of three or more persons," where such acts or threats result in, or "constitute a clear and present danger of," property damage or injury to another.[141] The statute defines inciting, organizing, promoting, encouraging, participating in, or carrying on a riot to mean "urging or instigating other persons to riot."[142] That definition specifically excludes advocacy of ideas or oral or written expression of beliefs that do not advocate violence.[143]

Although a potentially broad range of conduct could violate the anti-riot act, several limitations curtail its applicability. First, as noted, the law does not govern conduct lacking an interstate commerce nexus.[144] Second, the statute requires that while traveling in, or using a facility of, interstate commerce, the suspect engage in an overt act[145]—an outward manifestation of intent to commit a crime.[146] In practice, those overt acts appear to overlap with the four prohibited activities listed above.[147] Overt acts can include, for example, committing a violent act in furtherance of a riot.[148] Third, the statute applies only to intentional conduct, and courts have construed the anti-riot act to "require[] the government to prove a defendant's intent [to engage in a prohibited purpose] at two points in time:" (1) "when the defendant [travels in or] uses a facility of interstate commerce with the intent to incite a riot," and (2) "when the defendant commits an overt act . . . ."[149] Fourth, at least one federal court has imposed causality requirements between the defendant's conduct and the riot, requiring that the defendant's conduct be "sufficiently closely related as a propelling cause of a riot," and not a mere attenuated link.[150] Finally, there

[138] *E.g.*, Criminal Complaint, United States v. Rupert, No. 20-mj-344 (D. Minn. 2020).

[139] *See, e.g.*, Press Release, U.S. Dep't of Justice, Remaining Members of California-Based White Supremacist Group Plead Guilty to Federal Rioting Charges in Connection with August 2017 "Unite the Right" Rally in Charlottesville (May 3, 2019), https://www.justice.gov/usao-wdva/pr/remaining-members-california-based-white-supremacist-group-plead-guilty-federal-rioting (describing guilty pleas entered by individuals who, among other things, "assaulted protestors and other individuals" at a rally).

[140] 18 U.S.C. § 2101(a).

[141] *Id.* § 2102(a).

[142] *Id.* § 2102(b).

[143] *Id.*

[144] *Id.* § 2101(a); *accord* United States v. Daley, 378 F. Supp. 3d 539, 558 (W.D. Va. 2019), *aff'd sub nom.* United States v. Miselis, 972 F.3d 518 (4th Cir. 2020) (determining that § 2101 "plainly requires that a defendant travel in or use a facility of interstate or foreign commerce with the requisite intent").

[145] 18 U.S.C. § 2101(a).

[146] *Overt Act*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[147] *See* United States v. Rundo, No. 19-50189, 2021 WL 821938, at *4 (9th Cir. Mar. 4, 2021) ("We hold that the overt act requirement refers to acts that fulfill the elements themselves, and not mere steps toward, or related to, one or more of those elements.").

[148] *E.g.*, *Daley*, 378 F. Supp. 3d at 560.

[149] *E.g.*, United States v. Markiewicz, 978 F.2d 786, 813 (2d Cir. 1992).

[150] *E.g.*, United States v. Dellinger, 472 F.2d 340, 361 (7th Cir. 1972).

may be constitutional limitations on the application of the anti-riot act.[151] At least two federal appellate courts have held that to the extent Section 2101 prohibits urging, encouraging, or promoting a riot, it is overbroad and unconstitutionally proscribes First Amendment protected activity.[152] In addition, these courts concluded that the statutory language restricting Section 2101 from applying to oral or written expression of beliefs advocating violence is unconstitutional, because the effect is that Section 2101 prohibits advocacy of violence, and "the First Amendment protects that kind of advocacy."[153] These courts did not strike down all of Section 2101, however, but rather severed the portions deemed unconstitutional under the First Amendment.[154]

Civil Disorder: 18 U.S.C. § 231

Another federal criminal statute concerning violent unrest is the civil disorder statute, 18 U.S.C. § 231, which the Department of Justice (DOJ) has used to charge dozens of individuals in connection with the events of January 6, 2021 at the Capitol.[155] "Civil disorder" is a term of art defined as a "public disturbance involving acts of violence by assemblages of three or more persons, which causes an immediate danger of or results in" injury to the property or person of another.[156] Of note, section 231 imposes fines and a maximum prison term of five years for "commit[ting] or attempt[ing] to commit any act to obstruct, impede, or interfere with" a fireman or law enforcement officer "lawfully engaged in the lawful performance of his official duties" during a civil disorder, assuming certain jurisdictional requirements are satisfied.[157]

Although there is minimal case law construing the statute, courts have identified various limiting principles on its application. For example, the statute has been read to regulate violent physical acts only and not to concern speech.[158] In this vein, one federal appellate court upheld the civil disorder conviction of a defendant who threw a cherry bomb at a line of police officers responding to a fire at a riot.[159] Several other factors limit the applicability of the civil disorder statute. First, although it is silent on an intent requirement, courts have construed the civil disorder statute to criminalize only intentional conduct.[160] Second, like the anti-riot act discussed above, the civil disorder statute has jurisdictional limitations on its reach.[161] Specifically, the statute requires either (1) conduct that "obstructs, delays, or adversely affects" interstate

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[151] *See Rundo*, 2021 WL 821938, at *5-6.

[152] *Id.*; United States v. Miselis, 972 F.3d 518, 536-38 (4th Cir. 2020). These courts disagreed on whether § 2101's language prohibiting organizing a riot was similarly problematic. *Compare Rundo*, 2021 WL 821938, at *5 ("The verb 'organize' is similarly overbroad.") *with Miselis*, 972 F.3d at 537-38 ("[S]peech tending to organize a riot under § 2101(a)(2), unlike that of encouraging and promoting a riot, doesn't implicate mere advocacy of lawlessness, and may thus be proscribed.").

[153] *Rundo*, 2021 WL 821938, at *6; *accord Miselis*, 972 F.3d at 537-39.

[154] *Rundo*, 2021 WL 821938, at *3; *Miselis*, 972 F.3d at 541.

[155] *See Capitol Breach Cases*, U.S. Dep't of Justice (summarizing charges in prosecutions for conduct connected to the events of January 6, 2021 at the U.S. Capitol), https://www.justice.gov/usao-dc/capitol-breach-cases (last visited Mar. 30, 2021) [hereinafter *Capitol Breach Cases*].

[156] 18 U.S.C. § 232(1).

[157] *Id.* § 231(a)(3). Other subsections of the civil disorder statute prohibit other conduct such as demonstrating the use of, or transporting in interstate commerce, certain weapons while "knowing or having reason to know or intending that the same will be unlawfully employed for use in . . . a civil disorder." *Id.* § 231(a)-(2).

[158] United States v. Mechanic, 454 F.2d 849, 852 (8th Cir. 1971) ("[A]s we read it, § 231(a)(3) has no application to speech, but applies only to violent physical acts.").

[159] *Id.* at 851, 57.

[160] *Id.* at 854.

[161] 18 U.S.C. § 231(a)(3).

commerce or the movement of an article in interstate commerce, or (2) the obstruction of "the conduct or performance of any federally protected function . . . ."[162] A "federally protected function" includes any function or operation by any federal department, agency, instrumentality, officer, or employee pursuant to federal law.[163] Finally, although the statute provides a broad definition of "law enforcement officer," which may at times include federal, state, and military personnel,[164] the prosecutor bears the burden of establishing that law enforcement was acting lawfully during the alleged statutory violation.[165] At least one court has acquitted defendants of civil disorder charges for interfering with officers where the prosecutor failed to establish that those officers were acting within their lawful authority. [166]

Crimes against Government Authority

As discussed, the statutory definition of domestic terrorism includes certain dangerous conduct intended to influence government policy or intended to affect government conduct.[167] Conceptually, then, it is possible to envision instances of domestic terrorism amounting to crimes against government authority, such as treason, insurrection, or seditious conspiracy, though as detailed below, limited case law and significant statutory limitations may curtail the practical applicability of these statutes, and in practice prosecutors may gravitate towards other charges.[168]

Treason: 18 U.S.C. § 2381

Due to limited case law, the exact contours of the federal crime of treason are unclear.[169] Treason has been described as the "most serious offense" that may be committed against the government.[170] It is the only crime defined in the Constitution itself,[171] which specifies that treason "consist[s] only" of "levying War against" the United States or "adhering to their Enemies, giving them Aid and Comfort."[172] That definition is codified in Section 2381 of Title 18 of the U.S. Code, which imposes fines and a minimum sentence of five years of imprisonment for treason, and authorizes the death penalty.[173] Treason prosecutions are rare—particularly since the

[162] *Id*.

[163] *Id*. § 232(3).

[164] *Id*. § 232(7).

[165] *Id*. § 231(3); *accord* United States v. Red Feather, 392 F. Supp. 916, 918 (D.S.D. 1975); United States v. McArthur, 419 F. Supp. 186, 192 (D.N.D. 1975), *aff'd sub nom*. United States v. Casper, 541 F.2d 1275 (8th Cir. 1976); United States v. Jaramillo, 380 F. Supp. 1375, 1381 (D. Neb. 1974).

[166] *Jaramillo*, 380 F. Supp. at 1381.

[167] 18 U.S.C. § 2331(5).

[168] For example, despite speculation about their potential applicability, DOJ has so far not filed treason, insurrection, or seditious conspiracy charges connected to the events of January 6, 2021 at the U.S. Capitol, *Capitol Breach Cases*, *supra* note 155, although at least one federal prosecutor has reportedly stated that seditious conspiracy charges remain possible. Katie Bennar, *Evidence in Capitol Attack Most Likely Supports Sedition Charges, Prosecutor Says*, N.Y. TIMES (Mar. 21, 2021), https://www.nytimes.com/2021/03/21/us/politics/capitol-riot-sedition.html. Federal prosecutors reportedly have also considered whether the insurrection statute could apply to the events of January 6, 2021 at the U.S. Capitol. Press Release, U.S. Dep't of Justice, Federal authorities investigating any potential violations of federal law by residents of Southern District of Ohio at the U.S. Capitol (Jan. 7, 2021), https://www.justice.gov/usao-sdoh/pr/federal-authorities-investigating-any-potential-violations-federal-law-residents.

[169] *Infra*, note 174 and accompanying text.

[170] Stephan v. United States, 133 F.2d 87, 90 (6th Cir. 1943).

[171] *Id*.

[172] U.S. CONST. art. III, § 3, cl. 1.

[173] 18 U.S.C. § 2381.

1950s.[174] That said, there are a number of significant limits on applying the treason statute. First, the Constitution itself permits conviction for treason only where there is a "[c]onfession in open [c]ourt," or "testimony of two [w]itnesses to the same overt [a]ct"[175]—an action committed in furtherance of the treason.[176] Second, the Supreme Court has held that treason requires proof that the defendant "intend[ed] to betray his country."[177] Third, treason may only be committed by those who owe allegiance to the United States—such as citizens or some temporary residents[178]—and who breach that allegiance.[179] Furthermore, the concept of "levying war" is a "meticulously exclusive" phrase,[180] which the Supreme Court has held applies only to conduct involving "an actual assemblage of men for the purpose of executing a treasonable design."[181] It is unclear from the limited case law exactly what conduct would count within that definition, and the Supreme Court has cautioned that the "crime of treason should not be extended by construction to doubtful cases."[182] Conduct that falls outside the narrow definition of treason may still be subject to prosecution under other laws concerning crimes against the government—such as seditious conspiracy discussed below.[183]

Insurrection: 18 U.S.C. § 2383

The federal insurrection statute authorizes fines and up to ten years of imprisonment for anyone who "incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto."[184] The statute also bars anyone convicted of violating that provision from "holding any office under the United States."[185] The exact scope of the insurrection statute is unclear, in part because it does not define "rebellion" or "insurrection."[186] In addition, there is little interpretive case law, because prosecutions under the insurrection statute are rare.[187]

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[174] J. Richard Broughton, *Constitutional Discourse and the Rhetoric of Treason*, 47 HASTINGS CONST. L.Q. 303, 311 (2020) ("There has been no American treason conviction in well over a half century."); Paul T. Crane, *Did the Court Kill the Treason Charge?: Reassessing Cramer v. United States and Its Significance*, 36 FLA. ST. U. L. REV. 635, 639 (2009) ("However, after 1954 not a single American was charged with treason until . . . 2006.").

[175] U.S. CONST. art. III, § 3, cl. 1.

[176] *See* Haupt v. United States, 330 U.S. 631, 635 (1947) (contrasting defendant's overt acts that furthered the treason with a past case where proof of overt acts were insufficient because there was no testimony of the "treasonable character" of those overt acts).

[177] Cramer v. United States, 325 U.S. 1, 31 (1945).

[178] Carlisle v. United States, 83 U.S. 147, 154-55 (1872).

[179] *See* United States v. Rahman, 189 F.3d 88, 113 (2d Cir. 1999) ("Moreover, any acceptable recitation of the elements of treason must include the breach of allegiance.").

[180] Stephan v. United States, 133 F.2d 87, 90 (6th Cir. 1943).

[181] *Ex parte* Bollman, 8 U.S. 75, 127 (1807).

[182] *Id.*

[183] *See generally* Memorandum From Deputy Attorney General Jeffrey A. Rosen For All United States Attorneys – Charging in connection with violent rioting, including 18 U.S.C. § 2384 (Sep. 17, 2020), https://www.justice.gov/archives/opa/page/file/1317916/download [hereinafter Rosen Memorandum] (describing potential applicability of seditious conspiracy charges); *see also* Crane, *supra* note 174, at 639 (linking the limited treason prosecutions to the availability of other statutory charges).

[184] 18 U.S.C. § 2383.

[185] *Id.*

[186] *Id.*

[187] Erin Creegan, *National Security Crime*, 3 HARV. NAT'L SEC. J. 373, 381 (2012).

Seditious Conspiracy: 18 U.S.C. § 2384

Section 2384 of Title 18 of the U.S. Code provides:

> If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.[188]

In a 2020 memo to U.S. Attorneys (hereinafter the "Rosen Memo"), then-Deputy Attorney General Jeffrey A. Rosen noted that the statute "does not require proof of a plot to overthrow the U.S. Government, despite what the name might suggest."[189] Rather, the statute applies to any conspiracy—i.e., an agreement with the requisite intent[190]—with the object of using force to (1) overthrow, put down, or destroy the U.S. government, (2) oppose the authority of the United States, (3) prevent, hinder, or delay the execution of any law of the United States, or (4) seize, take, or possess any property of the United States contrary to its authority, among other things.[191] Though recent case law interpreting these phrases is limited, some authority indicates the types of conduct that might fall within the statute's scope.[192] For instance, the Rosen Memo specifically noted that charges under Section 2384 could be "potentially available" "where a group has conspired to take a federal courthouse or other federal property by force," presumably under the statutory prong proscribing forcibly seizing, taking, or possessing any property of the United States contrary to its authority.[193] Additionally, in an early twentieth century case, one federal court of appeals indicated that the prong addressing prevention, hindrance, or delay of the execution of federal law prohibits a conspiracy to use force "against some person who has authority to execute and who is immediately engaged in executing a law of the United States."[194] The seditious conspiracy statute has been used in recent decades in circumstances such as plots to bomb government buildings.[195]

With regard to the seditious conspiracy statute's "oppose by force" prong, a district court recognized that it implies "force against the government as a government."[196] The district judge explained that "the law is clear that seditious conspiracy requires an agreement to oppose by force the authority of the United States itself."[197] The judge further explained that "offensive speech and a conspiracy to do something other than forcibly resist a positive show of authority" by the government "is not enough to sustain a charge of seditious conspiracy."[198] As such, whether

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[188] 18 U.S.C. § 2384.

[189] *See* Rosen Memorandum, *supra* note 183.

[190] John Alan Cohan, *Seditious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of Government*, 17 ST. JOHN'S J. LEGAL COMMENT. 199, 210 (2003).

[191] 18 U.S.C. § 2384.

[192] *See* Cohan, *supra* note 190, at 206 (describing seditious conspiracy statute as "rarely used").

[193] Rosen Memorandum, *supra* note 183.

[194] Haywood v. United States, 268 F. 795, 800 (7th Cir. 1920).

[195] *E.g.*, United States v. Rodriguez, 803 F.2d 318, 319 (7th Cir. 1986).

[196] United States v. Stone, No. 10-20123, 2012 WL 1034937, at *4 (E.D. Mich. Mar. 27, 2012) (quoting Baldwin v. Franks, 120 U.S. 678, 693 (1887)).

[197] *Id.*

[198] *Id.* at *5.

charges would be warranted under the seditious conspiracy statute in connection with acts of domestic terrorism could ultimately depend not only on whether the conduct related to an agreement between two or more persons to take forcible action against the government, but also on whether (depending on the statutory prong at issue) the object of the agreement was actually in opposition to a positive assertion of government authority.[199] Seditious conspiracy charges are reportedly under consideration by DOJ in connection with the events of January 6, 2021 at the U.S. Capitol.[200]

Crimes against Persons

Domestic terrorism, by statutory definition, involves acts "dangerous to human life."[201] Regardless of its specific purpose then, conduct consistent with the statutory definition of domestic terrorism may violate a variety of federal statutes prohibiting crimes against persons.[202] For example, federal criminal statutes prohibit the kidnapping, assault, murder, or assassination of Members of Congress, Members-of-Congress Elect, Supreme Court Justices or nominees, various Cabinet members,[203] the President, Presidential Staff, the Vice President, the President-elect and Vice President-elect,[204] and family members of certain United States officials, judges or federal law enforcement officers.[205] Another federal statute criminalizes, among other things, conspiracies to use force to injure federal officers or officials.[206] Other federal criminal statutes prohibit assault and other violent conduct where the victim is within a certain type of special jurisdiction of the United States.[207] Although a comprehensive review of these and other federal laws prohibiting crimes against persons is beyond the scope of this report, this section provides an overview of several key statutes prohibiting crimes against persons, which may be of particular relevance in the context of domestic terrorism.

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[199] Another statute separately proscribes knowingly or willfully advocating, abetting, advising or teaching "the duty, necessity, desirability, or propriety of overthrowing or destroying" the federal or a state or local government "by force or violence" or by assassination, as well as organization of or affiliation with groups that do the same and distribution of related printed matter. 18 U.S.C. § 2385. Depending on the circumstances, some conduct to which Section 2384 is relevant might also be considered under Section 2385.

[200] *See, supra* note 168 and accompanying text; *but see* Mark Hosenball, *No seditious conspiracy charges emerge in U.S. Capitol riots cases*, REUTERS (June 3, 2021), https://www.reuters.com/legal/government/no-seditious-conspiracy-charges-emerge-us-capitol-riots-cases-2021-06-03/ ("A law enforcement official, who asked for anonymity to discuss debates among prosecutors, said there had been little recent discussion among key officials regarding seditious conspiracy charges.").

[201] 18 U.S.C. § 2331(5).

[202] *Infra*, § "Hate Crimes."

[203] 18 U.S.C. § 351. This statute is a predicate offense listed in 18 U.S.C. § 2339A, discussed above. *Supra*, § "Material Support to Terrorists Under 18 U.S.C. § 2339A."

[204] *Id.* § 1751. This statute is a predicate offense listed in 18 U.S.C. § 2339A, discussed above.

[205] *Id.* § 115.

[206] *Id.* § 372; *accord* United States v. Rakes, 510 F.3d 1280, 1288 (10th Cir. 2007) (listing elements under § 372 as requiring "(1) two or more persons to conspire (2) to prevent any person from discharging the duties of their office under the United States (3) by force, intimidation, or threat.").

[207] *See, e.g.*, 49 U.S.C. § 46504 (prohibiting assaulting or intimidating a "flight crew member or flight attendant of the aircraft" "on an aircraft in the special aircraft jurisdiction of the United States," if it "interferes with the performance of the duties of the member or flight attendant" (§ 46504 is a predicate offense for 18 U.S.C. § 2339A discussed above)); 18 U.S.C. § 1111 (prohibiting the "unlawful killing of a human being" when committed in the special territorial jurisdiction of the United States, such as various federal buildings and lands); *id.* § 113 (criminalizing assaults committed "within the special maritime and territorial jurisdiction of the United States").

Assaulting, Resisting, or Impeding Federal Officers or Employees: 18 U.S.C. § 111

Among other things, Section 111 of Title 18 of the U.S. Code authorizes various prison terms[208] for forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering with certain federal officers or employees.[209] DOJ has charged dozens of individuals under Section 111 in connection to the events of January 6, 2021 at the Capitol,[210] including individuals who allegedly struck law enforcement officers[211] or sprayed them with chemical agents,[212] among others.[213]

On its face, the statute appears to cover not only forcible *assault*—i.e., "an attempt or threat to injure"[214]—but broader categories of conduct such as forcibly *opposing* or *impeding* a federal officer.[215] However, regardless of the statutory term at issue, the conduct proscribed by Section 111 must be forcible, which does not require physical contact but, in one formulation, requires at least some "display of physical aggression toward the officer."[216] Federal courts disagree on whether Section 111 also requires, at a minimum, simple assault—meaning an attempt or threat to injure that does not involve actual physical contact, a weapon, bodily injury, or intent to commit certain felonies.[217] Section 111 protects "any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services)" and protects such individuals from being harmed while "engaged in or on account of" the person's "performance of official duties."[218] The statute may also protect state and local officers acting in cooperation with, and under the control of, federal officers,[219] and private citizens when they are assisting federal employees in their official duties.[220] Determining whether an officer or employee is "engaged in . . . performance of official duties" calls for a fact-specific analysis, but the officer or employee does not necessarily have to be "on duty" to meet the standard so long as he or she is carrying out a federal function.[221] Importantly, Section 111 also

[208] Acts under the statute that qualify as only "simple assault" are punishable by up to one year in prison, while acts that "involve physical contact with the victim of that assault or the intent to commit another felony" are punishable by imprisonment for up to eight years. *Id.* § 111(a). Use of a deadly or dangerous weapon or infliction of bodily injury enhances the applicable penalty to up to twenty years in prison. *Id.* § 111(b).

[209] *Id.* § 111(a)(1).

[210] *Capitol Breach Cases*, *supra* note 155.

[211] *E.g.*, Criminal Complaint, United States v. Blair, No. 1:21-mj-00211 (D.D.C. 2021).

[212] *E.g.*, Affidavit in Support of Criminal Complaint and Arrest Warrant, United States v. Nichols, No. 21-MJ-102; No. 21-MJ-103 (D.D.C. 2021).

[213] For a synopsis of charges filed to date, see generally *Capitol Breach Cases*, *supra* note 155.

[214] United States v. Wolfname, 835 F.3d 1214, 1217 (10th Cir. 2016).

[215] 18 U.S.C. § 111(a)(1).

[216] United States v. Taylor, 848 F.3d 476, 493 (1st Cir. 2017).

[217] *Compare Wolfname*, 835 F.3d at 1218 ("Because a § 111(a)(1) conviction for resisting, opposing, impeding, intimidating, or interfering must fall into one of these two categories, a conviction for any of these acts necessarily involves—at a minimum—simple assault.") *and* United States v. Chapman, 528 F.3d 1215, 1219 (9th Cir. 2008) (similar), *with* United States v. Gagnon, 553 F.3d 1021, 1026 (6th Cir. 2009) (concluding a violation of Section 111 does not necessarily require an assault).

[218] 18 U.S.C. § 111.

[219] United States v. Hooker, 997 F.2d 67, 74 (5th Cir. 1993); United States v. Burns, 725 F. Supp. 116, 130 (N.D.N.Y. 1989).

[220] *See, e.g.*, United States v. Holder, 256 F.3d 959, 966 (10th Cir. 2001) (affirming conviction under § 111(a) where defendant shot a private citizen assisting a United States Department of Agriculture employee in building a fence to comply with a wetlands easement).

[221] *See* United States v. Perea, 818 F. Supp. 2d 1293, 1303 (D.N.M. 2010) (collecting cases where victim was not necessarily on-duty).

requires that a person intend to engage in the proscribed conduct but does not require knowledge that the person subjected to the conduct is a federal officer or employee.[222]

Protection of Officers and Employees of the United States: 18 U.S.C. § 1114

The same government officers and officials protected by Section 111 also fall within the scope of Section 1114 of Title 18 of the U.S. Code, which criminalizes the attempted or actual killing of such individuals.[223] The maximum penalties authorized by the statute vary based on the circumstances and defendant's state of mind.[224] For example, a minimum sentence of life imprisonment is mandated where a federal officer or official is murdered by "poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing," or in the commission of "kidnapping, treason, espionage" or "sabotage," among other things.[225] Murder, for Section 1114 purposes is "the unlawful killing of a human being with malice aforethought"[226]—a notoriously confusing concept,[227] which generally requires either intent to inflict "serious bodily injury" or kill, or an "extreme recklessness and wanton disregard for human life."[228]

Kidnapping: 18 U.S.C. § 1201

Section 1201 of Title 18 of the U.S. Code prohibits kidnapping and related behavior in certain contexts.[229] The statute departs from the original common law definition of kidnapping, which

[222] United States v. Feola, 420 U.S. 671, 684 (1975).

[223] 18 U.S.C. § 1114. Section 1114 is a predicate offense for 18 U.S.C. § 2339A discussed above.

[224] *Id.*; *id.* §§ 1112, 1113.

[225] *Id.* § 1111

[226] *Id.*

[227] *See generally* United States v. Delaney, 717 F.3d 553, 555-59 (7th Cir. 2013) (describing malice aforethought and related terms and surveying the confusion often accompanying such concepts); *Malice Aforethought*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining malice aforethought as "encompassing any one of the following: (1) the intent to kill, (2) the intent to inflict grievous bodily harm, (3) extremely reckless indifference to the value of human life (the so-called 'abandoned and malignant heart'), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule)").

[228] Frascarelli v. United States Parole Comm'n, 857 F.3d 701, 705-06 (5th Cir. 2017) (quoting United States v. Browner, 889 F.2d 549, 551-52 (5th Cir. 1989)); *accord* United States v. Slager, 912 F.3d 224, 235-36 (4th Cir. 2019), *cert. denied*, 139 S. Ct. 2679 (2019) ("Malice aforethought may be established by evidence of conduct which is reckless and wanton and a gross deviation from a reasonable standard of care, of such a nature that a [factfinder] is warranted in inferring that [the] defendant was aware of a serious risk of death or serious bodily harm." (quoting United States v. Ashford, 718 F.3d 377, 384 (4th Cir. 2013)).

[229] 18 U.S.C. § 1201. Another similar statute is the federal hostage taking statute—18 U.S.C. § 1203. *See* United States v. Carrion-Caliz, 944 F.2d 220, 223 (5th Cir. 1991) (observing that "the federal kidnapping statute and the Hostage Taking Act are quite similar" with respect to their language and the conduct they prohibit). Under § 1203 it is a crime to seize or detain an individual and threaten to kill, injure, or continue the detention of that individual in order to compel the government or another individual to engage in, or refrain from, some action. 18 U.S.C. § 1203. In contrast to § 1201, which has limited "application to acts that occur beyond the borders of the United States," § 1203 "was adopted specifically 'to extend jurisdiction over extraterritorial crimes.'" *Carrion-Caliz*, 944 F.2d at 224 (quoting United States v. Yunis, 681 F.Supp. 896, 904 (D.D.C.1988)). Consistent with its focus on extraterritorial crime, § 1203 ordinarily does not apply to conduct committed inside the United States. 18 U.S.C. § 1203(b)(2). Thus its application to domestic terrorism may be limited, although there are statutory exceptions that could make the statute relevant in certain circumstances—such as where "the governmental organization sought to be compelled is the Government of the United States." *Id.* Section 1203 is a predicate offense for 18 U.S.C. § 2339A discussed above. Additional federal statutes prohibit certain kidnapping threats. *See infra*, § "Crimes Involving Threats."

narrowly referred to "tak[ing] and carry[ing] a person by force and against his will."[230] In contrast, Section 1201 encompasses a much broader array of conduct where a person is taken or confined without consent.[231] Under Section 1201(a) the statute applies where a defendant has "unlawfully seize[d], confine[d], inveigle[d], decoy[ed], kidnap[ped], abduct[ed], or carri[ed] away" a victim.[232] The Supreme Court has observed that this "[c]omprehensive language was used to cover every possible variety of kidnapping."[233] Thus, unlike kidnapping under the common law, Section 1201 does not require "asportation"—the carrying away of the victim.[234] Instead, restraining the victim's freedom, for example by seizure or confinement, may be sufficient.[235] In another divergence from common law kidnapping, a defendant may violate Section 1201(a) even if he does not use force—rather, tactics such as placing the victim in fear,[236] or using "false representations" or "promises" may also run afoul of the statute.[237]

Despite this breadth, there are several limits on the applicability of Section 1201(a). First, the defendant must "hold[] for ransom or reward or otherwise any person," which according to the Supreme Court, "implies an unlawful physical or mental restraint for an appreciable period against the person's will and with a willful intent so to confine the victim."[238] The "'holding' requirement is an essential element of kidnapping and must be established in every case,"[239] but "it has received surprisingly little attention in the case law."[240] One federal appellate court has suggested that holding requires more than fleeting conduct such as "momentary detention in the course of a holdup."[241] Courts also have interpreted the requirement that the victim be held for a *prohibited purpose*—namely "ransom or reward or otherwise"—broadly.[242] As one federal appellate court explained, a defendant need only hold a victim "for *any* reason which would in *any* way be of benefit" to the defendant.[243] Second, Section 1201(a) requires that the conduct implicates one of several jurisdictional nexuses, which may be satisfied where, for example, the defendant travels in interstate commerce in furtherance of the offense or where the victim is a federal official or employee.[244] Third, courts have interpreted Section 1201(a) to impose intent requirements on the part of the defendant.[245]

[230] United States v. Young, 512 F.2d 321, 323 (4th Cir. 1975).

[231] *Id.*

[232] 18 U.S.C. § 1201(a).

[233] Chatwin v. United States, 326 U.S. 455, 463 (1946).

[234] United States v. Etsitty, 130 F.3d 420, 426 (9th Cir. 1997), *opinion amended on denial of reh'g*, 140 F.3d 1274 (9th Cir. 1998).

[235] 18 U.S.C. § 1201(a).

[236] *Chatwin*, 326 U.S. at 460; *accord* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 18:2(a) (3d ed. 2019).

[237] United States v. Hoog, 504 F.2d 45, 51 (8th Cir. 1974).

[238] *Chatwin*, 326 U.S. at 460.

[239] United States v. Larsen, 615 F.3d 780, 787 (7th Cir. 2010).

[240] LaFave, *supra* note 236, § 18.2(a).

[241] United States v. DeLaMotte, 434 F.2d 289, 292-93 (2d Cir. 1970).

[242] United States v. Small, No. 20-5117, 2021 WL 486879, at *3 (6th Cir. Feb. 10, 2021).

[243] *Id.*

[244] 18 U.S.C. § 1201.

[245] *See* United States v. Miers, 686 F. App'x 838, 843 (11th Cir. 2017) (requiring that government must prove that defendant acted knowingly and willfully to "support a conviction under 18 U.S.C. § 1201(a)"); United States v. Ouedraogo, 531 F. App'x 731, 744 (6th Cir. 2013) (similar); United States v. Garza-Robles, 627 F.3d 161, 166 (5th Cir. 2010) (similar); United States v. Eng., No. 18 CR. 492 (PGG), 2020 WL 7773606, at *15 (S.D.N.Y. Dec. 30,

Violations of Section 1201(a) may ordinarily be punished by up to life imprisonment.[246] For violations resulting in death, however, Section 1201(a) imposes a mandatory minimum penalty of life imprisonment, and authorizes the death penalty.[247] A separate subsection—Section 1201(c)—also authorizes up to life imprisonment for conspiracies that violate Section 1201.[248] Prosecutions under Section 1201 have included, among others,[249] that of six defendants in connection with the 2020 plot to kidnap Michigan Governor Gretchen Whitmer as part of a purported plan to overthrow the government.[250]

Crimes Involving Infrastructure or Federal Property

Depending on where they occur and what they target, acts of domestic terrorism could conceivably run afoul of various federal criminal statutes that prohibit illicit conduct with respect to certain infrastructure or property.[251] For example, acts of domestic terrorism that occur on, or otherwise implicate, *federal* property could violate a number of federal criminal statutes protecting federal government property from destructive or violent behavior, among other things. A detailed analysis of these statutes is available in other CRS products,[252] but statutes that could be relevant to acts of domestic terrorism involving federal property include:

- ***Vandalism of Government Property, 18 U.S.C. § 1361***: Authorizes various fines and prison terms for willful injury of federal property.[253]
- ***Restricted Buildings or Grounds, 18 U.S.C. § 1752***: Imposes a range of criminal penalties[254] for certain conduct at "restricted building or grounds," which are defined to include, among others, locations where a "person protected by the

2020) (similar); United States v. Eason, No. 15-20015, 2016 WL 3545467, at *1 (C.D. Ill. June 22, 2016), *aff'd*, 854 F.3d 922 (7th Cir. 2017) (similar).

[246] 18 U.S.C. § 1201(a).

[247] *Id*.

[248] *Id*. Conspiracy is discussed in greater detail, *infra*, § "Conspiracy."

[249] *See, e.g.*, United States v. Medina, No. 2:20-CR-119, 2021 WL 1152708, at *1 (S.D. Ohio Mar. 26, 2021) (providing background of § 1201 prosecution connected to a "days-long hostage situation").

[250] Press Release, U.S. Dep't of Justice, Six Arrested on Federal Charge of Conspiracy to Kidnap the Governor of Michigan (Oct. 8, 2020), https://www.justice.gov/opa/pr/six-arrested-federal-charge-conspiracy-kidnap-governor-michigan; Criminal Complaint, United States v. Fox, No. 1:21-mj-416 (W.D. Mich. 2020). Several defendants in the matter have also been charged with other offenses such as "conspiracy to use a weapon of mass destruction and . . . federal firearms violations." Press Release, U.S. Dep't of Justice, Federal Grand Jury Returns a Superseding Indictment Adding New Charges in the Conspiracy to Kidnap Michigan Governor Gretchen Whitmer (Apr. 28, 2021), https://www.justice.gov/opa/pr/federal-grand-jury-returns-superseding-indictment-adding-new-charges-conspiracy-kidnap.

[251] *See, e.g.*, 18 U.S.C. § 43(a), (d)(1) (prohibiting certain damage or threats directed at animal enterprises such as zoos, circuses, aquariums, agricultural fairs, animal breeders, and academic or commercial entities engaged in animal research or testing (among others)); *id*. § 1369 (prohibiting, among other things, willful injury to, or destruction of, veteran's memorials "located on property owned by, or under the jurisdiction of, the Federal Government"); *id*. § 1855 (criminalizing, among other things, willfully setting fires to "timber, underbrush, or grass" without authority on certain federal lands); *id*. § 2152 (proscribing certain acts of trespass, injury, or destruction with respect to the "works or property or material of any submarine mine or torpedo or fortification or harbor defense system owned . . . by the United States").

[252] *See generally* CRS Legal Sidebar LSB10493, *Federal Criminal Laws Applicable to Rioting, Property Destruction, and Related Conduct*, by Peter G. Berris and Michael A. Foster; CRS Legal Sidebar LSB10564, *Federal Criminal Law: January 6, 2021, Unrest at the Capitol*, by Michael A. Foster and Peter G. Berris.

[253] 18 U.S.C. § 1361. Section 1361 is a predicate offense for 18 U.S.C. § 2339A discussed above.

[254] *Id*. § 1752(b).

Secret Service," such as the Vice President, "is or will be temporarily visiting."[255] Conduct prohibited at restricted buildings or grounds includes: (1) knowingly entering or remaining without lawful authority; (2) knowingly engaging in disruptive conduct, or impeding ingress or egress, "with intent to impede or disrupt the orderly conduct of Government Business or official functions;" and (3) knowingly engaging in "any act of physical violence against any person or property."[256]

- ***Unlawful Activities at United States Capitol Buildings and Grounds, 40 U.S.C. § 5104***: Authorizes various criminal penalties[257] for a range of conduct and activities on Capitol grounds or in Capitol buildings, specifically defined by a separate statute to include certain streets, roadways, and other areas surrounding the Capitol itself. Capitol buildings are defined to include the U.S. Capitol building and House and Senate office buildings, among other things.[258] In general, Section 5104 prohibits:
  - knowingly, with force and violence, entering or remaining on the floor of either house of Congress;
  - willfully and knowingly obstructing or impeding passage through or within the Capitol grounds or buildings;
  - willfully and knowingly engaging in an act of physical violence (defined as an act involving assault, other infliction or threat of infliction of death or bodily harm to an individual, or damage or destruction of real or personal property) on Capitol grounds or in Capitol buildings;
  - and, except as authorized by Capitol Police Board regulations, carrying or having readily accessible a firearm, a dangerous weapon (including a dagger or knife with a blade over three inches), an explosive, or an incendiary device, or using or discharging any of the preceding items.[259]

These statutes have been among the charges filed by DOJ in a number of cases arising from the events of January 6, 2021 at the U.S. Capitol, which illustrates their potential application to violent and destructive conduct targeting or occurring on federal property.[260]

Depending on the circumstances, acts of domestic terrorism could also implicate a variety of federal statutes that prohibit violent or destructive conduct targeting or involving infrastructure. For instance, a number of federal criminal statutes extend various protections to aircraft,[261]

[255] *Id.* § 1752(a), (c)(1).

[256] *Id.* § 1752(a)(1)-(5).

[257] 40 U.S.C. §§ 5109(a)-(b).

[258] *Id.* § 5102.

[259] *Id.* § 5104. A separate statute also prohibits, with exceptions, knowing possession of a firearm or other dangerous weapon in a "federal facility," the definition of which would appear to include the Capitol buildings because they are "owned or leased by the federal government" and have federal employees regularly present for the purpose of performing official duties. 18 U.S.C. § 930.

[260] *Capitol Breach Cases*, *supra* note 155.

[261] *See, e.g.*, 18 U.S.C. § 32 (criminalizing various destructive conduct directed towards aircraft or aircraft facilities (§ 32 is a predicate offense for 18 U.S.C. § 2339A discussed above)); 49 U.S.C. § 46502 (imposing criminal penalties for aircraft piracy (§ 46502 is a predicate offense for 18 U.S.C. § 2339A discussed above)); *id.* § 46505 (making it a crime to place, or attempt to place, an explosive or incendiary device on an aircraft, or use a dangerous weapon during flight (§ 46505 is a predicate offense for 18 U.S.C. § 2339A discussed above)).

international airports,[262] railroads and mass transportation systems,[263] energy facilities,[264] interstate gas pipelines and facilities,[265] and communications lines or systems.[266]

Hate Crimes

Depending on a defendant's motives or objectives, illicit conduct directed at persons or property may sometimes be a hate crime—defined by the FBI as a "criminal offense against a person or property motivated in whole or in part by an offender's bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity."[267] As discussed in another CRS product, the line between hate crimes and domestic terrorism can be "blurry."[268] Some cases may be "investigated as both a hate crime and an act of domestic terrorism," and DOJ has sometimes used both designations in connection with a single incident.[269] For example, DOJ pursued federal hate crime charges against an "Ohio man who drove his car into a crowd of counter-protestors" at the 2017 "Unite the Right Rally" in Charlottesville, Virginia.[270] In the press release announcing a guilty plea in that case, DOJ described the conduct as both a hate crime and domestic terrorism.[271] Similarly, a defendant who plotted to blow up a Colorado synagogue pleaded guilty to hate crime charges, and DOJ referred to his conduct as domestic terrorism in a press release.[272]

Given this conceptual overlap, federal hate crime statutes may be particularly relevant to the context of domestic terrorism. This section provides a brief overview of two such federal hate crime statutes: (1) Section 247 of Title 18 of the U.S. Code (prohibiting certain destruction of religious property or interference with the free exercise of religion) and (2) the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009 (HCPA), 18 U.S.C. § 249. Depending on the circumstances, a number of other federal statutes could also be applicable in the hate crime context, such as those prohibiting conspiracies to interfere with civil rights,[273] or criminalizing violent interference with certain federally protected rights.[274] A discussion of these additional statutes may be found in other CRS products.[275]

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[262] *See, e.g.*, 18 U.S.C. § 37 (criminalizing certain violence and destructive behavior at international airports (§ 37 is a predicate offense for 18 U.S.C. § 2339A discussed above)).

[263] *See, e.g., id.* § 1992 (prohibiting certain violent or destructive conduct directed towards railroads and other mass transportation systems (§ 1992, which uses the phrase "terrorist attacks" in its title, is a predicate offense for 18 U.S.C. § 2339A discussed above)).

[264] *E.g., id.* § 1366.

[265] *E.g.*, 49 U.S.C. § 60123(b). Section 60123(b) is a predicate offense for 18 U.S.C. § 2339A discussed above.

[266] *E.g.*, 18 U.S.C. § 1362. Section 1362 is a predicate offense for 18 U.S.C. § 2339A discussed above.

[267] *Hate Crimes,* FBI, https://www.fbi.gov/investigate/civil-rights/hate-crimes (last visited May 20, 2020).

[268] Sacco, *supra* note 4.

[269] *Id.*

[270] Press Release, U.S. Dep't of Justice, Ohio Man Sentenced to Life in Prison for Federal Hate Crimes Related to August 2017 Car Attack at Rally in Charlottesville, Virginia (June 28, 2019), https://www.justice.gov/opa/pr/ohio-man-sentenced-life-prison-federal-hate-crimes-related-august-2017-car-attack-rally.

[271] *Id.*

[272] Press Release, U.S. Dep't of Justice, Southern Colorado Man Sentenced to More Than 19 Years for Plotting to Blow Up Synagogue (Feb. 26, 2021), https://www.justice.gov/opa/pr/southern-colorado-man-sentenced-more-19-years-plotting-blow-synagogue.

[273] 18 U.S.C. § 241.

[274] *Id.* § 245; 42 U.S.C. § 3631.

[275] CRS In Focus IF11312, *Department of Justice's Role in Investigating and Prosecuting Hate Crimes*, by Nathan James.

Damage to Religious Property or Obstruction of Free Exercise: 18 U.S.C. § 247

Section 247 essentially prohibits two categories of conduct. The first category includes intentionally defacing, damaging, or destroying "religious real property,"[276] defined as "any church, synagogue, mosque, religious cemetery, or other religious real property, including fixtures or religious objects contained within a place of religious worship, or real property owned or leased by a nonprofit, religiously affiliated organization."[277] According to legislative history, Congress meant for this definition to include not only buildings and grounds, but also objects such as "torahs inside a synagogue."[278] A range of destructive conduct targeting religious real property may fall within this category, including bombings,[279] vandalism,[280] and intentional fires.[281] However, Section 247 only applies to destructive conduct committed because of the "religious character of that property" (assuming the conduct is "in or affects interstate or foreign commerce")[282] or because of "the race, color, or ethnic characteristics of any individual associated with that religious property."[283] In addition, the conduct must be intentional, a term undefined in Section 247.[284] In general "one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts."[285]

The second category of conduct that Section 247 criminalizes also includes actual or threatened force—specifically when used to obstruct an individual's enjoyment of free exercise of religious beliefs.[286] Drawing from First Amendment precedent, at least one federal court of appeals has concluded that Section 247's protection of free exercise of religious beliefs broadly "encompass[es] both . . . active practice" as well as "passive disassociation," such as the choice "to be free from the practice of religion altogether."[287] The court thus affirmed the Section 247 convictions of several defendants who had killed three former members of their religious sect because the former members had "chosen to disassociate themselves from the church's teachings

[276] In general, real property includes "[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land." *Property*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[277] 18 U.S.C. § 247(f).

[278] 142 CONG. REC. 17139, 17212 (1996) (joint statement of Sen. Lauch Faircloth, Sen. Edward Kennedy, Rep. John Conyers, and Rep. Henry Hyde).

[279] *E.g.*, United States v. Hari, No. 18CR015001DWFHB, 2019 WL 7838282, at *2 (D. Minn. Sept. 17, 2019), *report and recommendation adopted*, No. CR181501DWFHB, 2019 WL 6975425 (D. Minn. Dec. 20, 2019) (describing § 247 charges against defendant that bombed Islamic Center).

[280] *E.g.*, Press Release, U.S. Dep't of Justice, Man Sentenced in Connection with Arson at Planned Parenthood and Vandalism of Mosque in Madera, California (Jan. 9, 2012), https://www.justice.gov/opa/pr/man-sentenced-connection-arson-planned-parenthood-and-vandalism-mosque-madera-california (describing charge for destruction of religious property against individual who threw brick at mosque).

[281] *E.g.*, United States v. Perez, No. 18-40707, 2020 WL 7786934, at *1 (5th Cir. Dec. 30, 2020) (describing § 247 charges against defendant that burned down Islamic Center); Press Release, U.S. Dep't of Justice, Louisiana Man Pleads Guilty to Burning Three Baptist Churches in St. Landry Parish (Feb. 10, 2020), https://www.justice.gov/opa/pr/louisiana-man-pleads-guilty-burning-three-baptist-churches-st-landry-parish (summarizing § 247 charge against defendant who burned churches).

[282] 18 U.S.C. §§ 247(a)(1), 247(b) (footnote added).

[283] *Id.* § 247(c).

[284] *Id.* § 247.

[285] Tison v. Arizona, 481 U.S. 137, 150 (1987) (quoting W. LAFAVE & A. SCOTT, CRIMINAL LAW, § 28, p. 196 (1972)).

[286] 18 U.S.C. § 247(a)(2).

[287] United States v. Barlow, 41 F.3d 935, 936, 943 (5th Cir. 1994) (emphasis omitted).

and its fellowship."[288] That court also more broadly concluded that Congress intended Section 247(a)(2) to cover "the entire panoply of activities" protected under the U.S. Constitution's Free Exercise Clause.[289]

To qualify as a Section 247 violation, obstruction of free exercise of religion must affect interstate commerce.[290] That could occur, for example, where a suspect crosses state borders while committing an offense or uses interstate highways.[291] As with other conduct prohibited in Section 247, a defendant's interference with free exercise of religion must be intentional.[292]

Ordinarily, Section 247 violations may be punished by a maximum penalty of a $100,000 fine, a year of imprisonment, or both.[293] However, the statute authorizes more severe punishments in a number of circumstances, including the death penalty.[294] Since its enactment, Section 247 has been used to prosecute a range of conduct motivated by religious bias, including the plotted arson of a mosque,[295] the revenge killing of former members of a religious group who sought to dissociate from that religion,[296] and a shooting at a synagogue.[297]

Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009: 18 U.S.C. § 249

Generally, Section 249 makes it a crime to "willfully cause[] bodily injury to any person or, through the use of . . . a dangerous weapon," attempt to "cause bodily injury to any person" due to certain biases against the victim. Thus, the statute's scope depends in part on the meaning of both "willfully" and "bodily injury."[298] According to at least one court, conduct is willful in the context of Section 249 when it occurs "voluntarily and intentionally and with the specific intent to do something which the law forbids. . . that is to say, with bad purpose either to disobey or disregard the law."[299] "Bodily injury," meanwhile, includes only "an actual physical injury"[300] such as cuts, abrasions, bruises, burns, disfigurement, physical pain, illness, or an "impairment of the function of a bodily member, organ, or mental faculty."[301] It does not include emotional or psychological harm.[302] However, bodily injury need not actually result so long as the defendant

[288] *Id.* at 936-37. Another victim was the daughter of a former member who had witnessed the crime. *Id.*

[289] *Id.* at 943. For a recent examination of the scope of constitutional protections for the free exercise of religion, see generally CRS Legal Sidebar LSB10450, *UPDATE: Banning Religious Assemblies to Stop the Spread of COVID-19*, by Valerie C. Brannon.

[290] 18 U.S.C. § 247(b).

[291] United States v. Ballinger, 395 F.3d 1218, 1226-27 (11th Cir. 2005).

[292] 18 U.S.C. § 247(a)(2).

[293] 18 U.S.C. §§ 247; 3571.

[294] *Id.* § 247.

[295] United States v. Doggart, 947 F.3d 879, 881 (6th Cir. 2020).

[296] United States v. Barlow, 41 F.3d 935, 943 (5th Cir. 1994).

[297] Complaint, United States v. Earnest, No. 19MJ1900 (S.D. Cal. filed May 9, 2009), available at https://www.justice.gov/opa/press-release/file/1161421/download.

[298] 18 U.S.C. § 249(a)(1).

[299] Glenn v. Holder, 690 F.3d 417, 422-23 (6th Cir. 2012) (quoting United States v. Brown, 151 F.3d 476, 486 (6th Cir. 1998)) (internal quotation marks omitted).

[300] United States v. Jenkins, 909 F. Supp. 2d 758, 777 (E.D. Ky. 2012).

[301] 18 U.S.C. §§ 249(c)(1), 1365(h)(4).

[302] *Id.* § 249(c)(1) (defining "bodily injury" to exclude "solely emotional or psychological harm").

attempted to cause bodily injury through use of a weapon, firearm,[303] incendiaries, explosives,[304] or fire.[305]

As noted, in order for conduct to violate Section 249, it must be committed because of a prohibited bias.[306] Specifically, Section 249(a)(1) prohibits conduct committed because of the victim's "actual or perceived race, color, religion, or national origin."[307] Alternatively, Section 249(a)(2) criminalizes conduct committed because of bias against the victim's actual or perceived "religion, national origin, gender, sexual orientation, gender identity, or disability."[308] Section 249(a)(2) contains an additional jurisdictional requirement that Section 249(a)(1) does not: specifically, that the conduct at issue must implicate interstate commerce.[309] Section 249(a)(2) outlines a variety of ways in which that may occur.[310]

Generally, the maximum penalty for Section 249 violations is a $250,000 fine, imprisonment for up to ten years, or both.[311] However, Congress has authorized longer prison terms in certain instances, such as when the offense involves kidnapping or results in death.[312] Since its enactment, Section 249 has been used to prosecute a range of crimes with discriminatory motives, including a racially motivated assault[313] and a kidnapping and assault motivated by sexual orientation bias.[314] Federal prosecutors have also invoked Section 249 in high profile cases such

[303] Section 249 defines "firearm" by reference to 18 U.S.C. § 921, which in turn defines "firearm" to mean "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm." *Id.* §§ 249(a)(1), (c)(3); 921(a)(3).

[304] Section 249 defines "explosive or incendiary device" by reference to 18 U.S.C. § 232, which in turn defines "explosive or incendiary device" to mean "(A) dynamite and all other forms of high explosives, (B) any explosive bomb, grenade, missile, or similar device, and (C) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone." *Id.* §§ 232, 249(c)(2).

[305] *Id.* § 249(a)(1).

[306] *Id.* § 249.

[307] *Id.* § 249(a)(1).

[308] *Id.* § 249(a)(2).

[309] *Id.* § 249(a)(2).

[310] *Id.* § 249(a)(2)(B). The government may establish jurisdiction by showing that the conduct occurs during, or results from "travel of the defendant or the victim. . . across a state line or national border" or involves "a channel, facility, or instrumentality of interstate commerce." *Id.* § 249(a)(2)(B). For example, in *United States v. Jenkins*, a federal court concluded that an intrastate kidnapping and beating satisfied the jurisdictional element of § 249(a)(2) where the defendant traveled on an interstate highway (a channel of interstate commerce) and used a car (an instrumentality of commerce). 909 F. Supp. 2d 758, 771 (E.D. Ky. 2012). Alternatively, the government may also satisfy the interstate commerce requirement by proving that the defendant "employ[ed] a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce." 18 U.S.C. § 249(a)(2)(B)(iv). An alternate jurisdictional hook for the statute involves conduct occurring in the special maritime or territorial jurisdiction of the United States. *Id.* § 249(a)(3).

[311] 18 U.S.C. §§ 249(a)(1)-(2), *id.* § 3571.

[312] *Id.* § 249.

[313] Press Release, U.S. Dep't of Justice, Arkansas Man Pleads Guilty to Federal Hate Crime Related to the Assault of Five Hispanic Men (May 16, 2011), https://www.justice.gov/opa/pr/arkansas-man-pleads-guilty-federal-hate-crime-related-assault-five-hispanic-men.

[314] Press Release, U.S. Dep't of Justice, Two Harlan County, Kentucky, Men Indicted for Federal Hate Crime Against Individual Because of Sexual Orientation (Apr. 12, 2012), https://www.justice.gov/opa/pr/two-harlan-county-kentucky-men-indicted-federal-hate-crime-against-individual-because-sexual.

as the fatal shootings at Emanuel African Methodist Episcopal Church in Charleston, South Carolina in 2015,[315] and Tree of Life Synagogue in Pittsburgh, Pennsylvania in 2018.[316]

Crimes Involving Specific Weapons

One concern of federal law enforcement with respect to domestic terrorists has been their access to, and potential use of, certain weapons.[317] For example, in remarks about domestic terrorism in 2017, then-Deputy Attorney General Rosenstein cautioned that "[v]iolent domestic extremists have . . . acquired biological and chemical weapons, illegal firearms, and explosives."[318] As detailed above, a number of federal criminal statutes potentially applicable in the domestic terrorism context prohibit certain conduct committed with a specific weapon—or authorize increased penalties in such instances.[319] Depending on the circumstances, a domestic terrorist's choice of weapon could also potentially violate numerous federal criminal statutes specifically focused on regulating certain weapons.[320] This section briefly summarizes federal criminal laws governing three categories of weapons: (1) fire, explosives, and destructive devices; (2) firearms; and (3) chemical or biological weapons.[321]

Fire, Explosives, and Destructive Devices

A number of federal criminal statutes impose penalties for certain conduct involving fire, explosives, or similar means.[322] This subsection discusses additional federal criminal laws expressly restricting the use of fire, explosives, or destructive devices.

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[315] United States v. Roof, 225 F. Supp. 3d 438, 441 (D.S.C. 2016); Press Release, U.S. Dep't of Justice, Federal Jury Sentences Dylann Storm Roof to Death (Jan. 10, 2017), https://www.justice.gov/usao-sc/pr/federal-jury-sentences-dylann-storm-roof-death.

[316] Superseding Indictment, United States v. Bowers, No. 18-292, 2019 WL 720160 (W.D. Pa. Jan. 29, 2019); Press Release, U.S. Dep't of Justice, Additional Charges Filed in Tree of Life Synagogue Shooting (Jan. 29, 2019), https://www.justice.gov/opa/pr/additional-charges-filed-tree-life-synagogue-shooting.

[317] For instance, chemical and biological weapons have been described as a "most pressing concern," *Ten Years After 9/11: Hearing Before the Committee on Senate Homeland Security and Governmental Affairs*, 112th Cong. (Oct. 18, 2011) https://archives.fbi.gov/archives/news/testimony/ten-years-after-9-11-and-the-anthrax-attacks-protecting-against-biological-threats (statement of Vahid Majidi, Assistant Dir., Weapons of Mass Destruction Directorate, FBI), within the FBI's larger priority of "[p]rotect[ing] the United States from terrorist attack." *Organization, Mission and Functions Manual: Federal Bureau of Investigation*, U.S. Dep't of Justice, https://www.justice.gov/jmd/organization-mission-and-functions-manual-federal-bureau-investigation (last visited Apr. 2, 2021); *see also* CRS In Focus IF10651, *The Federal Bureau of Investigation: Just the Facts*, by Nathan James and Jerome P. Bjelopera (describing "thwart[ing] terrorists" as one of the FBI's "first two priorities," an effort that includes the "Weapons of Mass Destruction Directorate" that "coordinates efforts designed to prevent the use of chemical, biological, radiological, and nuclear weapons").

[318] Deputy Attorney General Rosenstein, Remarks at the 10th Annual Utah National Security and Anti-Terrorism Conference (Aug. 30, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-10th-annual-utah-national-security-0; *see also* Deputy Attorney General Carlin, Remarks at the National Summit on Homeland Security Law (Apr. 18, 2015), https://www.justice.gov/opa/speech/assistant-attorney-general-carlin-delivers-remarks-national-summit-homeland-security-law ("domestic extremists . . . have amassed illegal weapons, explosives, and biological and chemical weapons; and they have gone on killing sprees that have terrorized local communities.").

[319] *See, e.g.*, *supra* § "Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009: 18 U.S.C. § 249."

[320] *See, e.g.*, 18 U.S.C. § 1716 (prohibiting the knowing mailing of explosives, among other things).

[321] There is unavoidable overlap between these categories. For example, a statute may govern both firearms and destructive devices such as explosives. *E.g.*, *id.* § 922.

[322] *See supra*, § "Hate Crimes."

For example, Sections 842 and 844 of Title 18 of the U.S. Code contain a lengthy set of provisions that stringently regulate "explosive materials" and prohibit certain conduct involving explosives.[323] The term "explosive materials" is defined to include "any chemical compound mixture, or device, the primary or common purpose of which is to function by explosion."[324] A comprehensive, though not exclusive, list of explosive materials is published annually in the Federal Register.[325]

For items meeting the statutory definition of "explosive materials," Section 842(a)(3) prohibits their knowing receipt or transport by any person who does not have a federal license or permit.[326] Section 842(i) also separately prohibits the knowing transport, receipt, or possession of an explosive in or affecting interstate or foreign commerce by any person who falls into at least one of seven categories:

- indicted or convicted felons,
- fugitives from justice,
- addicts and unlawful users of controlled substances,
- those with certain mental health statuses,
- certain aliens,
- those dishonorably discharged from the armed forces, and
- U.S. citizens who have renounced their citizenship.[327]

"Knowing" receipt, transport, or possession for purposes of Section 842 requires that a person know that the objects have "the characteristics that [bring] them within the statutory definition of an explosive," e.g., that they are "primarily designed to function by explosion."[328] Following a Supreme Court decision interpreting a "nearly identical"[329] statute governing firearms, Section 842(i) also likely requires knowledge that a person falls into at least one of the prohibiting categories listed above.[330] Violations of Sections 842(a)(3) and 842(i) are punishable by fines and up to ten years in prison.[331]

Separate from Section 842, Section 844 of Title 18 of the U.S. Code prohibits "maliciously" *using* means of "fire or an explosive" to damage or destroy (or attempt to damage or destroy) a building, vehicle, or other real or personal property that is either (1) owned, possessed, or leased by the federal government or any institution or organization receiving federal financial assistance; or (2) used in interstate or foreign commerce or an activity affecting interstate or foreign commerce.[332] Transporting or receiving an explosive in interstate or foreign commerce "with the

[323] 18 U.S.C. §§ 842, 844.

[324] *Id.* § 841(c)-(d).

[325] *See* Commerce in Explosives; 2020 Annual List of Explosive Materials, 85 Fed. Reg. 83999, 83999-84001 (Dec. 23, 2020).

[326] 18 U.S.C. § 842(a)(3).

[327] *Id.* § 842(i).

[328] United States v. Markey, 393 F.3d 1132, 1136 (10th Cir. 2004).

[329] *Id.* at 1135.

[330] *See* Rehaif v. United States, 139 S. Ct. 2191, 2194 (2019) ("We hold that the word 'knowingly' applies both to the defendant's conduct and to the defendant's status.").

[331] 18 U.S.C. § 844(a)(1).

[332] *Id.* § 844(f)(1), (i).

knowledge or intent that it will be used" for the same purpose is prohibited, as well.[333] The term "explosive" is defined separately for purposes of Section 844 as including (among other things) incendiary devices (such as "Molotov cocktails"),[334] and other compounds, mixtures, and devices containing combinations of ingredients that may cause explosion when ignited.[335] To engage "maliciously" in the proscribed conduct, one must act intentionally or "with willful disregard of the likelihood that damage or injury [will] result from his or her acts."[336] Additionally, given the limitation that non-federal property protected by the statute must be used in commerce "or an activity affecting" commerce, the provision reaches only property that is in "active employment for commercial purposes" and not, for example, owner-occupied private residences.[337] Violations of the Section 844 arson provisions involving actual use of fire or an explosive (rather than mere receipt or transport) are subject to a five-year mandatory minimum sentence of imprisonment, which is increased to seven years if personal injury results.[338] Statutory maximum sentences also depend on the consequences resulting from the proscribed conduct—if death results, a person may be subject to the death penalty or to life imprisonment.[339]

Prosecutors have used Sections 842 and 844 to charge individuals for a range of alleged conduct such as setting fire to police vehicles,[340] and interstate transportation of explosives in connection with the "mailing [of] 16 improvised explosive devices . . . to 13 victims throughout the country, including 11 current or former U.S. government officials."[341]

Another example, the National Firearms Act (NFA), codified at Chapter 53 of Title 26 of the U.S. Code, generally limits the availability of certain kinds of weapons through a detailed taxation and registration system.[342] Among other things, Section 5861 makes it unlawful to receive, possess, or transfer a covered weapon without paying applicable taxes and ensuring the weapon is appropriately registered with the Bureau of Alcohol, Tobacco, Firearms and Explosives.[343] One category of weapon subject to the NFA is a "destructive device," which is defined to include "any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device."[344] To violate Section 5861, one must "know the characteristics of a [weapon] that bring it within the NFA's ambit," but one need not know the

[333] *Id.* § 844(d).

[334] *Id.* § 232(5); *see also* United States v. Reed, 726 F.2d 570, 574 (9th Cir. 1984) (describing Molotov cocktails as an example of an incendiary device for purposes of § 232(5)).

[335] 18 U.S.C. § 844(j).

[336] United States v. Whaley, 552 F.3d 904, 907 (8th Cir. 2009).

[337] Jones v. United States, 529 U.S. 848, 855-56 (2000).

[338] 18 U.S.C. § 844(f), (i).

[339] *Id.* § 844(f)(3), (i).

[340] Press Release, U.S. Dep't of Justice, Three Men Face Federal Arson Charges For Setting Fire To Police Patrol Vehicle During Protest In Downtown Las Vegas (June 4, 2020), https://www.justice.gov/usao-nv/pr/three-men-face-federal-arson-charges-setting-fire-police-patrol-vehicle-during-protest; William K. Rashbaum & Andrea Salcedo, *Two Lawyers Arrested in Molotov Cocktail Attack on Police in Brooklyn*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/nyregion/nyc-protests-lawyer-molotov-cocktail.html.

[341] Sayoc Plea Press Release, *supra* note 126.

[342] CRS Report R45629, *Federal Firearms Laws: Overview and Selected Legal Issues for the 116th Congress*, by Michael A. Foster, at 3-5.

[343] 26 U.S.C. § 5861.

[344] *Id.* § 5845(f).

requirements that make receipt, possession, or transfer unlawful (e.g., that a covered weapon is unregistered).[345] Violators of the NFA are subject to fines and imprisonment of up to ten years.[346]

A separate set of provisions collectively known as the Gun Control Act (GCA), primarily codified at Chapter 44 of Title 18 of the U.S. Code, impose further restrictions on the possession of most kinds of firearms, which are defined to include *destructive devices*.[347] Among other things, Section 922(g) of Title 18 of the U.S. Code establishes categories of persons who, because of risk-related characteristics, may not possess such devices in or affecting commerce.[348] The categories of excluded persons are similar to those described above under Section 842 and include, among others, convicted felons, fugitives from justice, and unlawful users or addicts of controlled substances.[349] To be convicted under the GCA, a person must knowingly possess the device and must know his or her prohibited status as well (e.g., that he or she is a convicted felon).[350] Violations of many of the prohibitions contained in the GCA and supplementing statutes are punishable as felonies, subjecting violators to criminal fines and statutory imprisonment ranges of varying lengths.[351] Increased penalties are also tied to transporting or receiving destructive devices in interstate or foreign commerce with intent to use them (or with knowledge they will be used) to commit separate felony crimes, as well as using, carrying, or possessing such devices in connection with "any crime of violence or drug trafficking crime."[352]

Prosecutions under Section 922(g) have included, among others, an individual who allegedly left a backpack full of explosive devices in downtown Pittsburgh,[353] and an individual who had previously been convicted of a felony and allegedly carried a Molotov cocktail during a protest in Jacksonville.[354]

Firearms

Various federal statutes, including some discussed above,[355] criminalize certain conduct involving firearms.[356] A thorough review of the federal firearm statutory regime is beyond the scope of this report, and may be found in other CRS products.[357] Nevertheless, as an illustration, one federal firearms law that could be applicable in the context of domestic terrorism is the GCA, discussed above.[358] Among other things, that law makes it a crime for certain categories of prohibited

[345] United States v. Cox, 906 F.3d 1170, 1194-95 (10th Cir. 2018).

[346] 26 U.S.C. § 5871.

[347] 18 U.S.C. § 921(a)(3)

[348] *Id*. § 922(g).

[349] *Id*.

[350] Rehaif v. United States, 139 S. Ct. 2191, 2194 (2019).

[351] 18 U.S.C. § 924.

[352] *Id*. § 924(a)(7)(b), (a)(7)(c)(1)(A)

[353] Press Release, U.S. Dep't of Justice, Pittsburgh Man Indicted for Possessing Destructive Devices (June 23, 2020), https://www.justice.gov/usao-wdpa/pr/pittsburgh-man-indicted-possessing-destructive-devices.

[354] Press Release, U.S. Dep't of Justice, Jacksonville Man Indicted For Possession Of Molotov Cocktail At Protest (June 10, 2020), https://www.justice.gov/usao-mdfl/pr/jacksonville-man-indicted-possession-molotov-cocktail-protest.

[355] *See, e.g.*, *supra* "Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009: 18 U.S.C. § 249."

[356] *See, e.g.*, 18 U.S.C. § 930(c) (prohibiting killing during attack on federal facility involving firearm (§ 930(c) is a predicate offense for 18 U.S.C. § 2339A discussed above))

[357] *See generally* Foster, *supra* note 342.

[358] Supra "Fire, Explosives, and Destructive Devices."

persons to ship, transport, possess, or receive any firearms or ammunition.[359] As with the GCA provisions concerning destructive devices discussed in the previous subsection, conviction for possession of a firearm by a prohibited person requires the defendant's knowledge (1) that he possesses the firearm, and (2) of his prohibited status.[360] Penalties for violations of the GCA are generally punishable as felonies and subject to various fines and sentencing ranges.[361] Depending on the circumstances, other federal firearms laws that may be applicable to domestic terrorism include those criminalizing transfer or possession of certain unregistered firearms,[362] machineguns,[363] and firearms undetectable by "x-ray machines or metal detectors at security checkpoints."[364]

Chemical or Biological Weapons

A number of federal criminal statutes regulate the creation, transfer, or use of chemical or biological weapons, including some of the statutes contained in Chapter 113B of Title 18 of the U.S. Code, which expressly focuses on terrorism.[365] In addition, Section 175 of Title 18 imposes penalties of up to life imprisonment for anyone who "knowingly develops, produces, stockpiles, transfers, acquires, retains, or possesses any biological agent . . . for use as a weapon," or threatens to do so.[366] Among other things, biological agents include a range of substances including microorganisms and infectious substances (or their components) "capable of causing . . . death" or disease in a human.[367] Section 175 only governs biological agents intended "for use as a weapon," and *excludes* biological agents used for "prophylactic, protective, bona fide research, or other peaceful purposes."[368] Section 175 prosecutions are somewhat rare, but have included, for example, the prosecution of an individual who attempted to acquire "the lethal biological toxin ricin."[369]

Another potentially relevant statute is Section 229 of Title 18 of the U.S. Code, which in general makes it a crime to knowingly "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain own, possess, or use, or threaten to use, any chemical weapon."[370] A "chemical weapon" for the purposes of Section 229 may include "[a] toxic chemical and its precursors," munitions or devices "specifically designed to cause death or other harm through toxic properties of those toxic chemicals," or certain related equipment.[371] A toxic

[359] 18 U.S.C. 922(g). The provision requires receipt, shipping, or transportation to be "in interstate or foreign commerce" and possession to be "in or affecting commerce." *Id*.

[360] Rehaif v. United States, 139 S. Ct. 2191, 2194 (2019).

[361] 18 U.S.C. § 924.

[362] 26 U.S.C. § 5861(d)-(e).

[363] 18 U.S.C. § 922(o).

[364] Foster, *supra* note 342, at 15.

[365] *Supra*, § "Remaining Chapter 113B Offenses."

[366] 18 U.S.C. § 175 (§ 175 is a predicate offense for 18 U.S.C. § 2339A discussed above)). Another related statute imposes criminal penalties on the transfer, receipt, or possession of biological agents by "restricted persons"—which may include, among others, convicted felons, fugitives from justice, or unlawful users of controlled substances. *Id*. § 175b (§ 175(b) is a predicate offense for 18 U.S.C. § 2339A discussed above)).

[367] *Id*. § 178(1).

[368] *Id*. § 175(c)

[369] United States v. Le, 902 F.3d 104, 106 (2d Cir. 2018); *see also* United States v. Crump, 609 F. App'x 621, 622 (11th Cir. 2015) (affirming § 17 conviction of defendant for possession of castor beans, which contained ricin),

[370] 18 U.S.C. § 229. Section 229 is a predicate offense for 18 U.S.C. § 2339A discussed above.

[371] *Id*. § 229F(1).

chemical, meanwhile, includes "any chemical which . . . can cause death, temporary incapacitation or permanent harm to humans or animals."[372] Notably, the statute exempts various government actors who are in possession of a weapon pending its destruction.[373] Violations of Section 229 generally result in fines or up to life imprisonment, or both, or death in the case of fatal violations.[374] As with Section 175, prosecutions under Section 229 appear to be relatively rare.[375] However, DOJ has used Section 229 to charge conduct such as possession of "77 grams of 75% pure potassium cyanide [that] could kill 450 people in its solid form,"[376] the attempted acquisition of nerve gasses possibly to "strik[e] a federal courthouse,"[377] and the placement of a chlorine bomb at a residence.[378] One notable illustration of Section 229's applicability to domestic terrorism is *United States v. Kimber* where the U.S. Court of Appeals for the Second Circuit affirmed the Section 229 conviction of a disgruntled patient who dispersed "elemental mercury" (a neurotoxin) throughout a medical facility.[379] The court cited to the federal definition of domestic terrorism and concluded that the patient's conduct was "quintessential terrorism" because his purpose was to "coerc[e] and intimidat[e] the public into forgoing treatment at the [medical facility]."[380]

There is an important limit to statutes like Sections 175 and 229: pursuant to Supreme Court precedent, they do not govern local conduct subject to state law, such as routine assaults that happen to involve biological agents or toxic chemicals.[381] Rather, as the Court noted, federal biological and chemical weapons statutes have as "core concerns," "acts of war, assassination, and terrorism" and do not reach "the simplest of assaults."[382] In determining whether local conduct is involved in a given prosecution, courts would likely evaluate the dangerousness of the weapon at issue and the potential or actual harm caused by that weapon.[383] Presumably, domestic terrorism would qualify as a "core concern" of Sections 175 and 229, and therefore not amount to the type of conduct outside the scope of these statutes.[384]

Crimes Involving Threats

In certain circumstances, acts of domestic terrorism may consist at least in part of threats.[385] For example, DOJ prosecuted an individual for a five-day crime spree it described as a "domestic

[372] *Id.* § 229F(8)(A).

[373] *Id.* § 229(b).

[374] *Id.* § 229A(a)(1)-(2).

[375] *See* Bond v. United States, 572 U.S. 844, 863 (2014) ("The Government has identified only a handful of prosecutions that have been brought under [Section 229].").

[376] United States v. Ghane, 673 F.3d 771, 776 n.3 (8th Cir. 2012).

[377] United States v. Crocker, 260 F. App'x 794, 796 (6th Cir. 2008).

[378] United States v. Fries, No. CR-11-1751-TUC-CKJ, 2012 WL 689157, at *1 (D. Ariz. Feb. 28, 2012).

[379] 777 F.3d 553, 556-57 (2d Cir. 2015).

[380] *Id.* at 561-62.

[381] Bond v. United States, 572 U.S. 844, 848 (2014); *see also* United States v. Levenderis, 806 F.3d 390, 397 (6th Cir. 2015) ("[G]iven the similarities between § 175 and § 229, we follow the Supreme Court's instruction and interpret § 175 in light of federalism principles, just as it did with § 229.").

[382] *Bond*, 572 U.S. at 863.

[383] *See Levenderis*, 806 F.3d at 397 (determining whether defendant's use of biological weapon was local conduct based on level of dangerousness of weapon).

[384] *See, e.g.*, United States v. Crocker, 260 F. App'x 794, 795-96 (6th Cir. 2008) (affirming § 229 prosecution of defendant who attempted to obtain components for chemical weapon as part of plot to attack federal buildings).

[385] A concern related to threats may be hoaxes. *See, e.g.*, *Think Before You Post: Hoax Threats are Serious Federal Crimes*, FBI, https://www.fbi.gov/news/stories/hoax-threats-awareness-100518 (last visited Apr. 4, 2021) (describing

terror attack," where the individual engaged in various behaviors such as mailing explosive devices to "current or former government officials" *and* conveying threats in interstate commerce, among other things.[386] Many of the federal criminal statutes discussed above prohibit some threats,[387] including several of the statutes expressly prohibiting terrorism.[388] In addition to these examples, Sections 875 and 876 of Title 18 of the U.S. Code authorize various prison terms for threatening to injure or kidnap another or threatening a person's property or reputation.[389] To violate Section 875, the threat must be transmitted in "interstate or foreign commerce,"[390] while to violate Section 876, the threat must be sent through the mail.[391] Given their similarity, courts often construe Sections 875 and 876 in relation to each other.[392] Pursuant to Supreme Court precedent, federal courts have generally interpreted both statutes to require subjective intent to threaten on the part of the defendant.[393] In addition, a number of federal courts have also required

harm posed by hoax threats). Hoaxes may violate a federal statute that makes it a crime to engage in "any conduct with intent to convey false or misleading information under circumstances where such information may reasonably be believed and where such information indicates that an activity has taken, is taking, or will take place that would constitute a violation" one of several chapters of the federal criminal code, including those governing terrorism and firearms, among others. 18 U.S.C. § 1038. DOJ has used the federal hoax statute to prosecute conduct such as reporting false bomb threats to law enforcement. Press Release, U.S. Dep't of Justice, Massachusetts Man Sentenced to More than 17 Years in Prison for Cyberstalking Former Housemate and Others, Computer Hacking, Sending Child Pornography and Making Over 100 Hoax Bomb Threats (Oct. 3, 2018), https://www.justice.gov/opa/pr/massachusetts-man-sentenced-more-17-years-prison-cyberstalking-former-housemate-and-others.

[386] Sayoc Plea Press Release, *supra* note 126.

[387] *Supra*, § "Substantive Criminal Laws."

[388] *Supra*, § "Federal Criminal Terrorism Laws."

[389] 18 U.S.C. §§ 875(b)-(d), 876(b)-(d). Both statutes also prohibit certain ransom demands made in connection to kidnappings. *Id.*

[390] *Id.* § 875.

[391] *Id.* § 876.

[392] *See* United States v. Spatig, 870 F.3d 1079, 1084 (9th Cir. 2017) (describing Sections 875 and 876 as "near twin[s]" and explaining that both require identical intent); *see also* United States v. Nicholas, 844 F. App'x 609, 611, n.1 (4th Cir. 2021) ("[T]he statutory language in § 875 and § 876 are nearly identical except for the jurisdictional element of interstate commerce versus the mail."); United States v. Stoner, 781 F. App'x 81, 85 (3d Cir. 2019), cert. denied, 140 S. Ct. 2676 (2020) (construing Sections 875 and 876 together); United States v. Haddad, 652 F. App'x 460, 461 (7th Cir. 2016) (similar).

[393] In the context of Section 875, the Supreme Court held in *Elonis v. United States* that, at a minimum, the defendant's conduct must rise above the level of negligence. 575 U.S. 723, 740 (2015). The Court reasoned that the "mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Id.* However, the Court expressly declined to consider whether mere recklessness is sufficient to satisfy the mental state requirement. *Id.* at 741. Following *Elonis*, a number of federal courts have construed Sections 875 and 876 to require subjective intent to threaten on the part of the defendant. United States v. Howard, 947 F.3d 936, 946 (6th Cir. 2020) (concluding, pursuant to *Elonis*, that the defendant must have "*intended* the message as a threat"); United States v. Dierks, 978 F.3d 585, 591 (8th Cir. 2020) ("[Following *Elonis*] the key question for *mens rea* is whether the defendant trasmit[ted] a communication for the purpose of issuing a threat or with knowledge that the communication [would] be viewed as a threat." (internal quotation marks omitted)); *Stoner*, 781 F. App'x at 85 (citing *Elonis* for proposition defendant must transmit a communication with the purpose of threatening someone or with the knowledge that the communication would be interpreted as a threat); United States v. Khan, 937 F.3d 1042, 1051 (7th Cir. 2019) (construing § 875 in light of *Elonis* to require that "the communication was transmitted for the purpose of issuing a threat, or with knowledge that the communication would be viewed as a threat"); *Haddad*, 652 F. App'x at 461 ("To secure convictions under § 875(c) and § 876(c), it would have been enough for the government to prove that Haddad had sent communications that were intended and reasonably perceived as being threatening."); United States v. White, 810 F.3d 212, 220-21 (4th Cir. 2016) (requiring government to prove subjective intent to threaten on part of defendant in light of *Elonis* in §875 conviction); *Nicholas*, 2019 WL 3774622, at *2 ("To prove guilt under 18 U.S.C. § 876(c), the government must prove that the defendant subjectively intended the mailing as a threat."). Mirroring *Elonis*, at least one federal court has

that the defendant transmit the threat knowingly as opposed to mistakenly.[394] In light of First Amendment speech protections, federal courts have interpreted Sections 875 and 876 as prohibiting only true threats[395]— statements conveying "an intent to commit an act of unlawful violence to a particular individual or group of individuals."[396] In determining whether a statement is a true threat for the purposes of Sections 875 and 876, courts consider whether a reasonable person would have considered the statement to be a threat.[397]

Crimes Involving Computers

At first glance, the concept of computer crime—with its connotations of illicit virtual conduct—may appear somewhat removed from the federal definition of domestic terrorism, which is focused on "acts dangerous to human life."[398] However, there may be overlap. The rise of internet-enabled computerized devices and objects—ranging from smart appliances to vehicles to infrastructure[399]—has potentially created new opportunities for cybercriminals to exact real world consequences through computer intrusion.[400] Although much of the cyberterrorism concern may

declined to weigh in on whether a reckless mental state could also suffice for the purposes of the federal threat statutes. *White*, 810 F.3d at 222 n.3.

[394] *See Khan*, 937 F.3d at 1051 ("[A] conviction under § 875(c) requires . . . the knowing transmission in interstate commerce of a communication"); United States v. Chapman, 866 F.3d 129, 136 (3d Cir. 2017) ("Accordingly, 18 U.S.C. § 876(c) . . . requires knowingly mailing a communication containing a threat."); *White*, 810 F.3d at 220-21 (holding that § 875 requires that a defendant "knowingly transmitted a communication in interstate or foreign commerce"); United States v. Baker, No. 4:21-MJ-09-MAF, 2021 WL 318311, at *3 (N.D. Fla. Jan. 25, 2021) (finding that there was probable cause of knowing transmission of a threat in violation of § 875 where "there [was] no indication that the Defendant accidently or mistakenly posted these communications").

[395] *See White*, 810 F.3d at 220-21 (holding that prosecution under Section 875 requires proof that "the content of the communication contained a 'true threat' to kidnap or injure"); United States v. Wolff, 370 F. App'x 888, 892 (10th Cir. 2010) ("The First Amendment, therefore, permits conviction under Section 876(c) only if the communication at issue constitutes a 'true threat.'"); United States v. Worrell, 313 F.3d 867, 874 (4th Cir. 2002) (similar); *see also* United States v. Nishnianidze, 342 F.3d 6, 14-15 (1st Cir. 2003) ("To convict under § 875, the government had to prove that the defendant intended to transmit the interstate communication and that the communication contained a true threat."); United States v. Sovie, 122 F.3d 122, 125 (2d Cir. 1997) (similar); United States v. Musgrove, 845 F. Supp. 2d 932, 945 (E.D. Wis. 2011) ("Because 18 U.S.C. § 875(c) criminalizes pure speech, the government must prove that an allegedly unlawful communication contains a 'true threat.'").

[396] Virginia v. Black, 538 U.S. 343, 359 (2003). For an examination of "true threats," see generally CRS Report R45713, *Terrorism, Violent Extremism, and the Internet: Free Speech Considerations*, by Victoria L. Killion. True threats are a regulable category of speech under the First Amendment. *See generally* CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion.

[397] *See Stoner*, 781 F. App'x at 85 (explaining that both Sections 875 and 876 require proof that the defendant transmitted a communication that objectively would be viewed as a threat by a reasonable person); *White*, 810 F.3d at 220-21 (describing Section 875 as requiring that the content of the communication amount to a true threat, which requires the government to prove that "an ordinary, reasonable recipient who is familiar with the context in which the statement is made would interpret it as a serious expression of an intent to do harm"); *see also Howard*, 947 F.3d at 946 (listing as an element of a § 875(c) violation that "*a reasonable observer* would view the message as a threat"); United States v. Stevens, 881 F.3d 1249, 1253 (10th Cir. 2018) (similar).

[398] 18 U.S.C. § 2331(5)(A).

[399] *See generally Understanding the Role of Connected Devices in Recent Cyber Attacks: Hearing Before H. Comm. on Energy and Commerce*, 114th Cong. 3 (2016) (statement of Bruce Schneier) [hereinafter Schneier testimony] (explaining the scope of computerization and how as a result the internet "now affects the world in a direct physical manner"); *see also* H.R. REP. NO. 98-894, at 10 (1984) ("[B]y combining the ubiquity of the telephone with the capability of the personal computer, a whole new dimension of criminal activity becomes possible.").

[400] For example, "in 2008, a fourteen-year-old boy hacked into the system controlling the trains of Lodz, Poland as a prank" and "made several trains change tracks, causing multiple derailments and injuries." Sara Sun Beale & Peter Berris, *Hacking the Internet of Things: Vulnerabilities, Dangers, and Legal Responses*, DUKE L. & TECH. REV.,

be international in scope,[401] it is at least conceivable that domestic terrorists could exploit computer vulnerabilities in a manner dangerous to human life.[402] To the extent such conduct involves hacking, it could violate the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030, a civil and criminal law, often described as the preeminent federal anti-hacking law,[403] which imposes a range of penalties for illicit computer-based behaviors.[404]

For example, installing malicious software on an internet-enabled computerized device to cause it to malfunction dangerously could violate Section 1030(a)(5)(A).[405] Among other things, that subsection prohibits the unauthorized transmission of "a program, information, code, or command" that damages protected computers[406] (any computer connected to the internet).[407] The phrase "program, information, code, or command" broadly includes "all transmissions that are capable of having an effect on a computer's operation," such as worms, "software commands (such as an instruction to delete information)," and "network packets designed to flood a network connection or exploit system vulnerabilities."[408] Transmission may occur through use of the internet or physical mediums like compact discs.[409] Some courts have concluded, however, that the exact means of transmission is irrelevant, focusing instead on whether the program, information, code, or command caused damage.[410] Damage means "impairment to the integrity or availability of data, a program, a system, or information,"[411] which occurs, for example, where a hacker causes a computer to behave in a manner contrary to its owner's intentions.[412] A thorough

February 14 2018, at 161, 165.

[401] *See, e.g., FBI Oversight Hearing*, *supra* note 2 (statement of Christopher Wray, Dir., FBI) (discussing "a huge range of other cyber threats from nation states, criminals, and toxic combinations of the two. Like the vast unrelenting counterintelligence threat from China.").

[402] A discussion of the various possibilities is necessarily speculative and beyond the scope of this report, but may be found elsewhere. *See generally* Schneier testimony, *supra* note 399; Beale, *supra* note 400.

[403] *E.g.*, Ivan Evtimov et al., *Is Tricking A Robot Hacking?*, 34 BERKELEY TECH. L.J. 891, 904 (2019) ("Since its implementation, the CFAA has been the nation's predominant anti-hacking law.").

[404] 18 U.S.C. § 1030.

[405] Section 1030(a)(5)(A) is a predicate offense for 18 U.S.C. § 2339A discussed above.

[406] 18 U.S.C. § 1030(a)(5)(A).

[407] *See, e.g.*, hiQ Labs, Inc. v. LinkedIn Corp., 938 F.3d 985, 999 (9th Cir. 2019) ("The term 'protected computer' refers to any computer 'used in or affecting interstate or foreign commerce or communication,' . . . effectively any computer connected to the Internet . . . including servers, computers that manage network resources and provide data to other computers." (quoting 18 U.S.C. § 1030(e)(2)(B)) (internal citations omitted)).

[408] U.S. DEP'T OF JUSTICE, COMPUTER CRIME & INTELLECTUAL PROPERTY SECTION, CRIMINAL DIVISION, PROSECUTING COMPUTER CRIMES, 37 (2015), https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ccmanual.pdf.

[409] Beale, *supra* note 400, at 170 (citing Deborah F. Buckman, Annotation, *Validity, Construction, and Application of Computer Fraud and Abuse Act (18 U.S.C.A. § 1030)*, 174 A.L.R. FED. 101 (2001)); *accord* United States v. Sullivan, 40 F. App'x 740, 743-44 (4th Cir. 2002) (per curiam) (concluding that a transmission under 18 U.S.C. § 1030(a)(5)(A) occurred through insertion of code into a computer system that eventually found its way into hand-held computers); N. Tex. Preventive Imaging LLC v. Eisenberg, No. SA CV 96-71AHS (EEX), 1996 WL 1359212, at *6 (C.D. Cal. Aug. 19, 1996) ("The transmission of a disabling code by floppy computer disk may fall within . . . [§ 1030(a)(5)(A)], if accompanied by the intent to cause harm.").

[410] *See, e.g.*, Patrick Patterson Custom Homes, Inc. v. Bach, 586 F. Supp. 2d 1026, 1035 (N.D. Ill. 2008) ("While Plaintiffs acknowledge that the precise method of installation of the erasure program is unknown, the Seventh Circuit recognizes that the precise mode of transmission is irrelevant.").

[411] 18 U.S.C. § 1030(e)(8).

[412] *See* United States v. Yücel, 97 F. Supp. 3d 413, 420 (S.D.N.Y. 2015) (construing damage under § 1030(a)(5) to include instances where a computer is caused to "no longer operate[] only in response to the commands of the owner").

analysis of this and other substantive provisions of the CFAA exceeds the scope of this report, but is available in other CRS products.[413]

Computers and the internet may pose other issues with respect to domestic terrorism, such as the use of social media to coordinate plots.[414] There may also be constitutional and privacy concerns with respect to the government acquisition of data to combat domestic terrorism, among other things.[415]

Inchoate and Accomplice Liability

As identified above, in many of the statutes establishing federal offenses that overtly relate, or may be applied, to conduct meeting at least one definition of domestic terrorism, conspiracies and attempts are also proscribed.[416] Additionally, some of the federal offenses addressed above are themselves inchoate[417]—for instance, 18 U.S.C. § 2384 prohibits seditious conspiracies, and 18 U.S.C. § 2101 prohibits taking certain preliminary actions with intent to incite or participate in rioting, among other things.[418] The conspiracy offenses expressly provided for in particular statutes may have their own, unique requirements. However, federal law more broadly criminalizes any conspiracy to commit another federal offense.[419] Although there is no general federal attempt provision, the components of an attempt, as prohibited in many federal criminal statutes, are well-recognized.[420] Separately, 18 U.S.C. § 373 prohibits soliciting another to commit a federal violent felony.[421] And 18 U.S.C. § 2 establishes *accomplice* liability for anyone who "aids, abets, counsels, commands, induces or procures" the commission of any federal offense.[422] As such, one does not necessarily need to meet all of the elements of the offenses described in this report through one's own conduct for such offenses to be applicable, if the requirements for conspiracy, attempt, solicitation, or accomplice liability are met. This section provides an overview of these alternative and additional means of establishing federal criminal liability in relation to conduct that may constitute domestic terrorism.[423]

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[413] See generally CRS Report 97-1025, *Cybercrime: An Overview of the Federal Computer Fraud and Abuse Statute and Related Federal Criminal Laws*, by Charles Doyle; CRS Report R46536, *Cybercrime and the Law: Computer Fraud and Abuse Act (CFAA) and the 116th Congress*, by Peter G. Berris.

[414] *Infra*, § "Terrorist Speech and the Internet." Another issue addressed in other CRS products is the potential use of end-to-end encryption to conceal such plots. *See generally* CRS In Focus IF11769, *Law Enforcement and Technology: the "Lawful Access" Debate*, by Kristin Finklea; CRS Report R44481, *Encryption and the "Going Dark" Debate*, by Kristin Finklea; CRS Legal Sidebar LSB10416, *Catch Me If You Scan: Constitutionality of Compelled Decryption Divides the Courts*, by Michael A. Foster; CRS Report R44642, *Encryption: Frequently Asked Questions*, by Chris Jaikaran.

[415] *Infra*, § "Fourth Amendment."

[416] *See supra*, §§ "Federal Criminal Terrorism Laws;" "Other Federal Criminal Laws Applicable to Domestic Terrorism."

[417] Attempt, conspiracy, and solicitation are commonly referred to as "inchoate" offenses in the sense that they are "forms of introductory misconduct that the law condemns lest they result in some completed form of misconduct." Doyle, *Conspiracy*, *supra* note 48, at 15.

[418] *See supra*, § "Anti-Riot Act: 18 U.S.C. § 2101;" "Seditious Conspiracy: 18 U.S.C. § 2384."

[419] 18 U.S.C. § 371.

[420] *See generally* CRS Report R42001, *Attempt: An Overview of Federal Criminal Law*, by Charles Doyle.

[421] 18 U.S.C. § 373(a).

[422] *Id.* § 2(a). Section 2 also permits punishment if one "willfully causes an act to be done which if directly performed by him or another would be" a federal offense. *Id.* § 2(b).

[423] The information in this section is drawn in significant part from three other CRS reports: Doyle, *Conspiracy*, *supra* note 48; Doyle, *Attempt*, *supra* note 420; and CRS Report R43769, *Accomplices, Aiding and Abetting, and the Like: An*

Conspiracy

18 U.S.C. § 371 makes it a crime for "two or more persons [to] conspire . . . to commit any [federal] offense," if "one or more of such persons do any act to effect the object of the conspiracy."[424] "[T]he essence of a conspiracy is an agreement to commit an unlawful act."[425] Put simply, a conspiracy is "a joint commitment to an endeavor which, if completed, would satisfy all of the elements of the underlying substantive criminal offense."[426] Though a party to a conspiratorial agreement does not have to intend to commit an underlying offense him or herself, he or she must specifically intend for someone to consummate the unlawful object of the conspiracy.[427] Additionally, under Section 371,[428] at least one of the parties to the conspiracy must perform an "overt act" in its furtherance.[429] However, the overt act need not be criminal, nor even an element of the object crime or another crime.[430]

Where these elements are met, a conspiracy to commit a federal crime may be punished under Section 371 as a crime in its own right, whether or not the object crime is completed.[431] That said, if the crime that is the objective of the conspiracy *is* carried out, a party to the conspiracy may also separately be charged with that crime,[432] as well as any other foreseeable crime committed in furtherance of the conspiracy.[433] Accordingly, Section 371 may be a distinct charge in many cases where there is concerted action in connection with other statutes described in this report that are related or applicable to domestic terrorism. Those who participate in domestic terrorism conspiracies under Section 371 may be liable for other crimes described in this report or elsewhere that are committed by co-conspirators. Violations of Section 371 are punishable by fine, imprisonment for up to five years (in the case of an object crime that is a felony), or both.[434]

Attempt

A number of the statutes addressed in this report that establish offenses related or applicable to domestic terrorism also proscribe attempts to commit said offenses.[435] Attempt encompasses those actions taken by individuals who intend to commit an offense and perform "an overt act

Overview of 18 U.S.C. § 2, by Charles Doyle.

[424] 18 U.S.C. § 371.

[425] United States v. Jimenez Recio, 537 U.S. 270, 274 (2003) (quoting Iannelli v. United States, 420 U.S. 770, 777 (1975)) (internal quotation marks omitted). Because a conspiracy requires the agreement of at least two people, no conspiracy can exist if the agreement is with an undercover government agent or other party who is only feigning assent. *E.g.*, United States v. Leal, 921 F.3d 951, 959 (10th Cir. 2019).

[426] United States v. Annamalai, 939 F.3d 1216, 1232 (11th Cir. 2019) (citation, internal alteration, and internal quotation marks omitted).

[427] Ocasio v. United States, 136 S. Ct. 1423, 1429-30 (2016).

[428] As explained previously, some statutes that separately proscribe conspiracies to violate their provisions do not require an overt act and thus may give rise to liability based on agreement alone, with the requisite mental state. *See supra* notes 48-50 and accompanying text.

[429] United States v. $11,500.00 in U.S. Currency, 869 F.3d 1062, 1072 (9th Cir. 2017).

[430] United States v. Bradley, 917 F.3d 493, 505 (6th Cir. 2019); *Doyle, Conspiracy*, *supra* note 48, at 8 & n.63.

[431] United States v. Vallone, 752 F.3d 690, 697-98 (7th Cir. 2014).

[432] United States v. George, 886 F.3d 31, 41 (1st Cir. 2018).

[433] United States v. Henry, 984 F.3d 1343, 1355 (9th Cir. 2021).

[434] 18 U.S.C. § 371.

[435] *E.g.*, *id.* § 2339A(a) (prohibiting attempt to provide material support or resources to terrorists).

qualifying as a substantial step toward completion of [that] goal."[436] A "substantial step" requires more than mere preparation to commit an offense, and determining "the point at which preliminary action becomes a substantial step is fact specific" and may depend on the particular offense at issue.[437] A charge of attempt does not require completion of the target crime,[438] but unlike conspiracy, if the target crime *is* committed, one may not be punished separately for both the completed crime and attempt to commit it.[439] Penalties for attempt depend on the particular statute in which attempt is proscribed, though generally, federal attempt crimes carry the same penalties as the substantive offense.[440]

Solicitation

18 U.S.C. § 373 prohibits solicitation to commit a "crime of violence"—in other words, efforts to induce another to commit such a crime "under circumstances strongly corroborative" of an intent that the other should do so.[441] A "crime of violence" is defined as a federal felony "that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another."[442] "Evidence sufficient to strongly corroborate a defendant's intent includes, but is not limited to, evidence showing that the defendant: (1) offered or promised payment or some other benefit to the person solicited; (2) threatened to punish or harm the solicitee for failing to commit the offense; (3) repeatedly solicited the commission of the offense or expressly stated his seriousness; (4) knew or believed that the person solicited had previously committed a similar offense; or (5) acquired weapons, tools or information, or made other preparations, suited for use by the solicitee."[443]

Although a full explication of the process for determining whether an offense is a "crime of violence" based on the statutory definition in Section 373 is beyond the scope of this report, several offenses that address or can apply to domestic terrorism undoubtedly qualify.[444] As such, Section 373 may be used as a separate vehicle to charge efforts to recruit others to commit such offenses as described in other sections of this report, provided the requisite intent and corroborative circumstances are present.

[436] United States v. Resendiz-Ponce, 549 U.S. 102, 107 (2007); United States v. Vinton, 946 F.3d 847, 852 (6th Cir. 2020).

[437] Doyle, *Attempt*, *supra* note 420, at 5; *see* United States v. Farhane, 634 F.3d 127, 147, 148 (2d Cir. 2011) (discussing substantial step requirement in context of attempt to provide material support to foreign terrorist organization in violation of 18 U.S.C. § 2339B).

[438] United States v. Nguyen, 829 F.3d 907, 917 (8th Cir. 2017).

[439] United States v. Rivera-Relle, 333 F.3d 914, 921 n.11 (9th Cir. 2003).

[440] Doyle, *Attempt*, *supra* note 420, at 12.

[441] 18 U.S.C. § 373(a). As with attempt, one may not be guilty of both solicitation and the completed crime that was solicited. United States v. Korab, 893 F.2d 212, 213 (9th Cir. 1989).

[442] 18 U.S.C. § 373(a).

[443] United States v. Dvorkin, 799 F.3d 867, 879 (7th Cir. 2015). By statute, preventing commission of the crime solicited "under circumstances manifesting a voluntary and complete renunciation of" one's criminal intent is an affirmative defense to prosecution. 18 U.S.C. § 373(b). That the person solicited could not be convicted of the crime due to legal incapacity is no defense, however. *Id.* § 373(c).

[444] *E.g.*, United States v. Doggart, 947 F.3d 879, 883 (6th Cir. 2020) (involving solicitation to commit federal arson under 18 U.S.C. § 844(i)).

Accomplice Liability

18 U.S.C. § 2 establishes that accomplices or "aiders and abettors" of federal crimes are guilty to the same extent as those who directly carry them out.[445] Section 2 does not define a separate crime, but rather delineates "alternative means of incurring criminal liability" for an underlying offense.[446] The statute actually comprises two forms of accomplice liability with substantial overlap. Section 2(a) speaks of one who "aids, abets, counsels, commands, induces or procures" the commission of a federal crime.[447] Aiding and abetting requires that one associate himself with an effort to carry out a crime, "participate[] in it as in something he wishe[s] to bring about, and [seek] by his actions to make it succeed."[448] Something more is required than merely being present at the scene of a crime with knowledge that it will be carried out,[449] but a defendant's participation need not advance every element of the aided crime.[450] That said, the accomplice must intend that the underlying offense be committed, which requires that he be aware in advance of its scope.[451] It is also a prerequisite that the crime then be accomplished.[452]

Section 2(b) provides that one who "willfully causes an act to be done which if directly performed by him or another would be" a federal offense is "punishable as a principal" for the completed crime.[453] Although it appears that much of the same ground is covered by the language of 2(a) regarding one who "commands, induces or procures" commission of a federal crime, Congress enacted Section 2(b) to clarify that accomplice liability applies "to defendants who work through either culpable or innocent intermediaries."[454] To violate the provision, one must intentionally cause another to act in violation of the underlying statute, with the intent required for such a violation.[455]

As noted above, Section 2 does not establish distinct criminal offenses; it provides means for charging those who aid in federal crimes with the aided crimes themselves. As such, one may be prosecuted for violations of the federal statutes related to domestic terrorism that are discussed in other sections of this report not only where one personally and individually carries out the prohibited acts, but also where one acts as an accomplice under Section 2 to assist in commission of the underlying offenses by others.

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[445] 18 U.S.C. § 2(a).

[446] Doyle, *Accomplices*, *supra* note 423, at 1.

[447] 18 U.S.C. § 2(a).

[448] United States v. Tanco-Baez, 942 F.3d 7, 27 (1st Cir. 2019) (quoting United States v. Luciano-Mosquera, 63 F.3d 1142, 1149-50 (1st Cir. 1995)).

[449] *Id.*

[450] United States v. De Nieto, 922 F.3d 669, 677-78 (5th Cir. 2019).

[451] Rosemond v. United States, 572 U.S. 65, 77-78 (2014).

[452] United States v. Freed, 921 F.3d 716, 721 (7th Cir. 2019) ("Additionally, it is axiomatic that one cannot aid and abet a crime unless a crime was actually committed."). 18 U.S.C. § 3 separately punishes one who gives assistance *after* a crime has occurred as an "accessory after the fact." *See* 18 U.S.C. § 3 ("Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.").

[453] 18 U.S.C. § 2(b).

[454] Doyle, *Accomplices*, *supra* note 423, at 7; *see* United States v. Singh, 924 F.3d 1030, 1050 (9th Cir. 2019), *vacated on other grounds by* Azano Matsura v. United States, 140 S. Ct. 991 (2020) (mem. op.) ("Section 2(b) is intended to impose criminal liability on one who causes an intermediary to commit a criminal act, even though the intermediary who performed the act has no criminal intent and hence is innocent of the substantive crime charged.").

[455] *See* United States v. Gumbs, 283 F.3d 128, 382-83 (3d Cir. 2002) (holding that defendant must possess *mens rea* required by underlying criminal statute that he causes intermediary to violate and the intent to cause the act prohibited).

Domestic Terrorism at Sentencing

Beyond the federal criminal offenses described above that can apply to domestic terrorism, conduct defined or related to domestic terrorism may be relevant to *sentencing* those convicted of federal crimes in at least two ways. First, some federal criminal statutes provide for heightened statutory maximum sentences if a violation of the statute involves or relates to terrorism.[456] Second, conduct related to terrorism can factor in to calculating the sentence range recommended by the U.S. Sentencing Guidelines.[457]

Statutes with Terrorism-Related Sentence Enhancement Provisions

Several federal statutes that do not, in their ordinary context, relate to terrorism nevertheless provide for increased penalties if terrorism is involved.[458]

1. 18 U.S.C. § 1001 prohibits knowingly and willfully making or using materially false statements or documents "in any matter within the jurisdiction of the executive, legislative, or judicial branch" of the federal government, punishable by fine and/or imprisonment for up to five years.[459] However, "if the offense involves international or domestic terrorism" as defined in 18 U.S.C. § 2331, the statutory maximum sentence increases to eight years.[460]
2. Similarly, 18 U.S.C. § 1505 proscribes intentionally influencing, obstructing, or impeding (or endeavoring to do any of the three) congressional or federal administrative proceedings, punishable by fine and/or imprisonment for up to

[456] *E.g.*, 18 U.S.C. § 1001(a) (increasing sentence for making false statements to the government from 5 to 8 years "if the offense involves international or domestic terrorism"). A connection to terrorism may have other statutory effects beyond sentence enhancement—for instance, whether the defendant has allegedly committed a federal crime of terrorism under 18 U.S.C. § 2332b factors into the judicial decision as to whether he or she should be released or detained pending trial. *See* 18 U.S.C. § 3142(e)(3), (g)(1) (providing that probable cause to believe the person committed "an offense under . . . 2332b" establishes rebuttable presumption that detention should be ordered and requiring consideration of "the nature and circumstances of the offense charged, including whether the offense is . . . a Federal crime of terrorism").

[457] *See infra*, § "Terrorism under the U.S. Sentencing Guidelines."

[458] Though not a sentence enhancement provision *per se*, one federal statute not discussed elsewhere in this report incorporates domestic terrorism as an element in a limited context. Specifically, 18 U.S.C. § 226 prohibits bribery, i.e., corruptly giving, offering, or promising anything of value to any public or private person, with intent to commit international or domestic terrorism (as defined in 18 U.S.C. § 2331) and to induce unlawful action or further fraud affecting a secure seaport area. 18 U.S.C. § 226(a)(1). The statute also prohibits *receipt* of bribes in return for being influenced in the performance of any official act affecting a secure seaport area, if the bribe recipient knows the influence will be used "to commit, or plan to commit, international or domestic terrorism." *Id.* § 226(a)(2). Violations are punishable by fines and/or up to fifteen years in prison. *Id.* Other provisions may also increase statutory penalties specifically for foreign-focused conduct related to terrorism—for instance, 21 U.S.C. § 960a addresses narco-terrorism and requires imprisonment for at least twice the minimum required for controlled substance distribution offenses, up to life in prison, if the conduct would be punishable as one of those offenses if committed within the jurisdiction of the United States and the offender knows or intends to provide anything of pecuniary value to a person or organization engaging in terrorist activity or terrorism, among other things. 21 U.S.C. § 960a(a).

[459] 18 U.S.C. § 1001(a).

[460] *Id.*

five years.[461] If a Section 1505 offense involves international or domestic terrorism, however, imprisonment for up to eight years is authorized.[462]

3. 18 U.S.C. § 1028 addresses identity theft, i.e., the production, possession, and distribution of fraudulent or unauthorized identification documents, authentication features, and means of identification of other persons.[463] In essence, the offenses in Section 1028 relate to the unlawful use of false or unauthorized documents or information used for identification purposes, such as drivers' licenses, social security numbers, or unique biometric identifiers, to name a few.[464] Authorized sentences under Section 1028 depend on the provision violated and certain other factors and, for violations unrelated to terrorism, can range from up to one year to up to twenty years' imprisonment.[465] For offenses "committed to facilitate an act of domestic terrorism" or international terrorism, fines and/or imprisonment for up to thirty years are authorized.[466]
4. 18 U.S.C. § 1028A prohibits aggravated identity theft, i.e., knowingly and without lawful authority transferring, possessing, or using a "means of identification of another person" during and in relation to specifically enumerated federal felonies such as making false statements to acquire a firearm or embezzling public money.[467] Violations are punished by an additional term of imprisonment of two years on top of the punishment for the underlying felony.[468] Separately, however, the statute proscribes the same conduct, involving means of identification of another person or false identification documents,[469] during and in relation to felony violations of the statutes listed as "federal crimes of terrorism" in 18 U.S.C. § 2332b.[470] In this latter circumstance, an additional five years of imprisonment is added to the punishment for the underlying offense.[471]

[461] *Id.* § 1505. The statute also separately addresses interference with DOJ civil investigative demands issued in antitrust cases. *Id.*

[462] *Id.* For more information on Section 1001 false statements and Section 1505 obstruction generally, see CRS Report RL34303, *Obstruction of Justice: An Overview of Some of the Federal Statutes That Prohibit Interference with Judicial, Executive, or Legislative Activities*, by Charles Doyle.

[463] The statute proscribes eight separate categories of conduct related to the unlawful production, possession, transfer, or trafficking of authentication features, identification documents, means of identification of others, and document-making implements. 18 U.S.C. § 1028(a)(1)-(8). At least one of a number of specific jurisdictional prerequisites must be met for the offenses in Section 1028 to apply. *See id.* § 1028(c).

[464] *See id.* § 1028(d)(1)-(8) (defining terms "authentication feature," "identification document," and "means of identification," among others).

[465] *Id.* § 1028(b)(1)-(3), (6). Fines are also authorized. *Id.*

[466] *Id.* § 1028(b)(4).

[467] *Id.* § 1028A(a)(1), (c). A "means of identification" is defined in Section 1028 as "any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual," such as a social security number, date of birth, or passport number, among other things. *Id.* § 1028(d)(7).

[468] *Id.* § 1028A(a)(1).

[469] An "identification document" is defined in Section 1028 as "a document made or issued by or under the authority" of a domestic or foreign government or certain other entities "which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals." *Id.* § 1028(d)(3).

[470] *See id.* § 2332b(g)(5)(B).

[471] *Id.* § 1028A(a)(2).

5. A significant number of federal statutes make murder in particular contexts a capital offense.[472] However, the death penalty may be imposed only if, among other things,[473] at least one statutory aggravating circumstance is proven beyond a reasonable doubt at a subsequent sentencing hearing.[474] 18 U.S.C. § 3592 lists the mitigating and aggravating factors that are to be considered in determining whether a sentence of death is justified. Among the aggravating factors for homicide is that death occurred during commission, attempted commission, or immediate flight from commission of a number of other federal offenses, the majority of which are included on the list of "federal crimes of terrorism" in 18 U.S.C. § 2332b.[475] For instance, one of the offenses through which the aggravating factor can apply is the Chapter 113B offense involving the use of WMDs, which can apply to cases meeting the statutory definition of domestic terrorism.[476] Additionally, a separate aggravating factor for homicide is that the defendant "committed the offense after substantial planning and premeditation to . . . commit an act of terrorism."[477] Though "act of terrorism" is undefined in Section 3592, it appears that the aggravating factor can apply to domestic acts.[478]

Terrorism under the U.S. Sentencing Guidelines

As described elsewhere, federal criminal offenses that may be applied to domestic terrorism are subject to varying statutory maximum penalties. The sentence actually imposed on a defendant below, or up to, a particular statutory maximum is also influenced by the U.S. Sentencing Guidelines.[479] A court must begin the sentencing process by correctly calculating the sentence range recommended by the Guidelines for the offense.[480] That range is consulted, along with other statutory factors, to arrive at a sentence that is "reasonable."[481] Sentencing ranges under the Guidelines are calculated based on a defendant's "Offense Level" and "Criminal History Category."[482] In turn, the "Offense Level" is determined by reference to a "base offense level" set for the particular offense, as listed in Chapter Two of the Guidelines, that is adjusted up or down in light of characteristics specific to the offense as committed.[483] "Adjustments" found in Chapter Three of the Guidelines based on victim, the defendant's role in the offense, and certain other

[472] *See* CRS Report R42095, *Federal Capital Offenses: An Overview of Substantive and Procedural Law*, by Charles Doyle, at 13 ("Murder is a capital offense under more than 50 federal statutes.").

[473] At least one of several mental-state requirements also must be met. 18 U.S.C. § 3591(a)(2).

[474] *See id.* § 3593(c)-(e).

[475] *Id.* § 3592(c)(1).

[476] *See id.*; *supra* notes 111-115 and accompanying text.

[477] 18 U.S.C. § 3592(c)(9).

[478] *See* United States v. Tsarnaev, 968 F.3d 24, 81 (1st Cir. 2020) (addressing terrorism aggravating factor in connection with sentencing of one of the men involved in Boston marathon bombing).

[479] *See generally* CRS Report R41696, *How the Federal Sentencing Guidelines Work: An Overview*, by Charles Doyle.

[480] Gall v. United States, 552 U.S. 38, 49 (2007).

[481] *Id.* at 46.

[482] U.S. SENT'G GUIDELINES MANUAL § 1B1.1 (U.S. SENT'G COMM'N 2018).

[483] *Id.* Depending on the offense, the offense level may be increased, before further adjustment under Chapter Three of the Guidelines, based on the relationship of the offense to terrorism. For instance, the guideline for obstruction of justice provides a base offense level of fourteen, but for convictions under 18 U.S.C. § 1001 or § 1505 that relate to international or domestic terrorism, an increase of twelve levels is required. *Id.* § 2J1.2; *see also id.* § 2X1.1 (attempt, solicitation, or conspiracy not covered by a specific offense guideline); *id.* § 2X3.1 (accessory after the fact).

circumstances may then be applied to further modify the offense level, criminal history category, or both.[484]

Section 3A1.4 of the Guidelines' Chapter Three adjustments specifically addresses terrorism. The adjustment provides that for a felony offense "that involved, or was intended to promote, a federal crime of terrorism," the offense level must be increased substantially—specifically, by twelve levels or to Level 32, whichever is higher.[485] Additionally, the defendant's criminal history category is automatically increased to the highest category—Category VI.[486] An application note specifies that the term "federal crime of terrorism" has the meaning given the term in 18 U.S.C. § 2332b(g)(5)—i.e., the term refers to a specifically enumerated list of over fifty federal offenses, many of which may apply to domestic terrorism, that are "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct."[487] A separate application note effectively expands this definition for purposes of Guidelines sentencing, in two respects: if either (1) the offense meets the "calculated to influence or affect . . . or to retaliate against government" component of the "federal crime of terrorism" definition but involved or was intended to promote a federal offense not listed in Section 2332b(g)(5), or (2) the offense involved or was intended to promote a federal offense listed in Section 2332b(g)(5) but sought to "intimidate or coerce a *civilian* population" rather than being targeted at the government, the court may still impose a sentence up to the top of the range that would result if the terrorism adjustment applied.[488]

Given the language that an offense must have "involved" or been "intended to promote" a federal crime of terrorism, federal courts have treated the adjustment as establishing two distinct avenues for application: first, the adjustment can apply if the offense "involves" a federal crime of terrorism in the sense that it includes an offense listed in Section 2332b(g)(5) that meets the "calculated to influence or affect . . . or to retaliate against government" requirement;[489] second, the adjustment can apply if the offense is "intended to promote" a federal crime of terrorism, which does not require that the underlying offense be included in Section 2332b(g)(5) but instead encompasses situations where the defendant has as a purpose, in committing the underlying criminal conduct, the promotion of a crime of terrorism, i.e., "to encourage, further, or bring about" such a crime.[490] Under the "intended to promote" prong, the sentencing court must "identify which enumerated 'Federal crime of terrorism' the defendant intended to promote" and

[484] *Id.* § 1B1.1.

[485] *Id.* § 3A1.4(a).

[486] *Id.* § 3A1.4(b).

[487] *Id.* § 3A1.4 cmt. 1; 18 U.S.C. § 2332b(g)(5). For further discussion of federal crimes of terrorism, see *supra* notes 27-33 and accompanying text.

[488] U.S. SENT'G GUIDELINES MANUAL § 3A1.4 cmt. 4 (U.S. SENT'G COMM'N 2018) (emphasis added); *see, e.g.*, United States v. Jordi, 418 F.3d 1212, 1217 (11th Cir. 2005) (recognizing departure was authorized in case involving plans to bomb abortion clinics, as conduct involved an offense enumerated in Section 2332b(g)(5)(B) and lower court found the defendant sought to intimidate or coerce civilians).

[489] *See* United States v. Fidse, 862 F.3d 516, 522 (5th Cir. 2017). The "involves" prong may be met if the court finds for purposes of sentencing under the Guidelines that a listed federal crime of terrorism was committed. *Id.*

[490] United States v. Awan, 607 F.3d 306, 314 (2d Cir. 2010). A Section 3A1.4 application note reinforces the point by making clear that "harboring or concealing a terrorist who committed a federal crime of terrorism" in violation of 18 U.S.C. § 2339 or § 2339A, both of which are listed in Section 2332b(g)(5)(B), meets the Section 3A1.4 criteria, as does "obstructing an investigation of a federal crime of terrorism" despite the fact that obstruction would not necessarily directly involve a Section 2332b(g)(5)(B) offense. U.S. SENT'G GUIDELINES MANUAL § 3A1.4 cmt. 2 (U.S. SENT'G COMM'N 2018).

"satisfy the elements of § 2332b(g)(5)(A)," i.e., find that the promoted crime was "calculated to influence or affect . . . or to retaliate against government," based on facts in the record.[491]

Courts have treated the prerequisite that a "federal crime of terrorism" be "calculated to influence or affect . . . or to retaliate against government" as establishing a specific intent requirement.[492] This intent requirement is distinct from motive, as the focus is not "on the defendant but on his 'offense,' asking whether it was calculated, i.e., planned—for whatever reason or motive—to achieve the stated object."[493]

Considerations for Congress

Both current law and possible future domestic terrorism legislation may give rise to several practical and constitutional considerations for Congress. First is the question of whether there is a gap in current laws applicable to foreign and domestic terrorism, including what policy arguments exist for and against a new domestic terrorism law. Next, several potential constitutional issues related to congressional power and the First and Fourth Amendments are relevant to existing, and possible new, laws regarding domestic terrorism. This section addresses each consideration in turn and concludes with a summary of recent domestic terrorism legislation in the 116th and 117th Congresses.

Is there a Gap in Current Law?

This section analyzes whether there is a disparity in federal law addressing domestic and foreign terrorism in two respects: (1) the types of offenses available to prosecute terrorism and sentences imposed for those offenses; (2) the investigatory tools available to law enforcement.[494]

Differences in Offenses and Sentences

Federal law defines both *domestic terrorism* and *international terrorism*.[495] There is, however, no specific federal crime of domestic terrorism. Moreover, as discussed above, the way federal law treats each type of terrorism differs to some degree.[496] While some of the offenses in Chapter 113B of Title 18 of the U.S. Code can apply to both domestic and international terrorism,[497] other statutes in that chapter apply only to conduct that takes place outside the United States[498] or has

[491] United States v. Graham, 275 F.3d 490, 517 (6th Cir. 2001).

[492] *E.g.*, United States v. Alhaggagi, 978 F.3d 693, 699-700 (9th Cir. 2020) ("The parties agree, consistent with the district court's decision and those of our sister circuits that have addressed the issue, that § 2332b(g)(5)(A) imposes a specific intent requirement."); United States v. Ansberry, 976 F.3d 1108, 1127 (10th Cir. 2020); United States v. Hassan, 742 F.3d 104, 148-49 (4th Cir. 2014).

[493] *Awan*, 607 F.3d at 317; *Alhaggagi*, 978 F.3d at 700.

[494] For additional discussion of these and other issues, see Doyle, *Domestic Terrorism*, *supra* note 5.

[495] *See* 18 U.S.C. § 2331(1) and (5) (defining *international terrorism* and *domestic terrorism*, respectively).

[496] *Compare* § "Federal Criminal Terrorism Laws" *with* § "Other Federal Criminal Laws Applicable to Domestic Terrorism," both *supra*.

[497] *E.g.*, 18 U.S.C. §§ 2332a (prohibiting the use of weapons of mass destruction), 2332g (prohibiting the use of missile systems designed to destroy aircraft), 2339A (prohibiting material support to terrorists in connection with enumerated offenses).

[498] *E.g.*, 18 U.S.C. §§ 2332 (prohibiting homicide and other violent acts against U.S. nationals outside the United States), 2332d (prohibiting financial transactions with foreign governments that support international terrorism), 2339D (prohibiting the receipt of "military-type training" from a foreign terrorist organization).

an international component.[499] Yet, a number of other existing federal criminal laws could potentially apply to acts of domestic terrorism.[500] At least one commentator has observed that 18 U.S.C. § 2339A—which prohibits material support of terrorism—explicitly lists more than fifty "federal crimes of terrorism" that could be applicable to either domestic or international terrorism.[501]

At the same time, these and other federal crimes are limited; they do not—and cannot—cover all conceivable criminal conduct. The Constitution limits the types of laws that Congress may pass.[502] Likewise, the federal courts are constrained by the Constitution and by statute in the types of cases they may hear.[503] As a result, it is possible that some individuals engaging in conduct that satisfies Section 2331(5)'s definition of *domestic terrorism* could evade federal prosecution.[504] For example, while 18 U.S.C. § 1114 prohibits killing officers and employees of the United States,[505] federal law does not—and cannot—prohibit murder generally.[506] Thus, an individual likely could be charged under Section 2339A for providing material support for the killing of a federal officer or employee.[507] In contrast, an individual could not be charged under Section 2339A for providing material support for the killing of a state employee unless the offense fell within one of the other listed statutes in Section 2339A. Conversely, though it is also possible that some conduct meeting the definition of international terrorism could evade federal prosecution, there are additional laws applicable specifically to international terrorism that have no domestic counterparts, such as the Section 2339B prohibition on providing material support or resources to designated foreign terrorist organizations.[508] Some commentators have argued that

[499] *E.g.*, 18 U.S.C. § 2332b. As discussed above, *see supra*, § "Terrorism Transcending National Boundaries: 18 U.S.C. § 2332b," it is unclear the extent to which § 2332b—which applies to acts of terrorism transcending national boundaries—could apply to domestic terrorism. In at least one case, a co-conspirator's online exchange of information with a person outside the United States was enough to constitute conduct transcending national boundaries for the purposes of § 2332b. United States v. Wright, 285 F. Supp. 3d 443, 459-60 (D. Mass 2018), *aff'd*, 937 F.3d 8 (1st Cir. 2019). It is less clear whether § 2332b could be used to prosecute a crime with a more tenuous international connection.

[500] See "Other Federal Criminal Laws Applicable to Domestic Terrorism" above for a more detailed discussion of these laws.

[501] *See* GERMAN & ROBINSON, *supra* note 21, at 5-7 (discussing the domestic application of the predicate offenses listed in 18 U.S.C. § 2339A). Some of these potential offenses include violence at international airports, 18 U.S.C. § 37, killing any person with a firearm or dangerous weapon in federal facilities, *id.* § 930(c), killing or attempting to kill any officer or employee of the United States, *id.* § 1114, and hostage taking, *id.* § 1203.

[502] *See infra*, § "Constitutional Issues."

[503] *See, e.g.*, Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by the Constitution and statute . . . which is not to be expanded by judicial decree . . . . It is to be presumed that a cause lies outside of this limited jurisdiction." (internal citations omitted)).

[504] These individuals could still be subject to prosecution in state courts. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 128 (1982) ("The States possess primary authority for defining and enforcing the criminal law.").

[505] 18 U.S.C. § 1114.

[506] Torres v. Lynch, 136 S. Ct. 1619, 1624 (2016) (reiterating that "'Congress cannot punish felonies generally'" (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428 (1821)). Rather, Congress "may enact only those criminal laws that are connected to one of its constitutionally enumerated powers, such as the authority to regulate interstate commerce" *Id.* That said, murder and homicide are federally proscribed in other statutes with specific jurisdictional limitations. *E.g.*, 18 U.S.C. § 1111 (establishing penalties for murder in the special maritime and territorial jurisdiction of the United States).

[507] 18 U.S.C. § 2339A(a) (recognizing 18 U.S.C. § 1114 as a crime subject to the material support prohibition).

[508] 18 U.S.C. § 2339B.

the lack of domestic counterparts to these laws constitutes a gap between domestic and international anti-terrorism laws.[509]

In addition to this potential gap in how the federal government may prosecute domestic and international terrorism, some have asserted that there is a disparity in the types of sentences judges may impose on those convicted under federal law of international and domestic terrorism. While some existing federal criminal statutes provide for heightened maximum sentences if a violation of the statute involves or relates to terrorism, these heightened sentences are not available for all crimes.[510] Likewise, although the U.S. Sentencing Guidelines include provisions that take terrorism into account when calculating the sentencing range for an offense,[511] these provisions apply only to conduct that relates to one of the "federal crimes of terrorism" enumerated in 18 U.S.C. § 2332b(g)(5).[512] Thus, whether an individual may be subject to increased penalties for terrorism depends on the statute under which the individual is convicted. In light of the possible gap in the laws available to charge domestic and international terrorism, some commentators argue that the terrorism-related sentence enhancements disproportionately apply to individuals convicted of international terrorism.[513] This potential sentencing gap might also result from prosecutorial discretion; some commentators argue that prosecutors are less likely to charge acts of domestic terrorism under available anti-terrorism laws, which could result in fewer terrorism-related sentencing enhancements in domestic cases.[514]

Differences in Intelligence Gathering

In the surveillance and intelligence-gathering context, federal law again provides different tools for law enforcement depending on whether an act of terrorism is domestic or international. In domestic cases, government investigations must comply with specific constitutional and statutory limits, including the Fourth Amendment's right to be secure "against unreasonable searches and seizures."[515] Under that right, where an individual has a reasonable expectation of privacy or there is a physical intrusion into a constitutionally protected area, the government generally must show probable cause and obtain a warrant before conducting a search.[516]

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[509] *E.g.*, Sinnar, *supra* note 4, at 1334-35 ("Material support to terrorism laws . . . do not apply equally to domestic and international terrorism."). *But see* GERMAN & ROBINSON, *supra* note 21, at 9 (arguing that the anti-terrorism laws "that apply domestically provide ample authority to prosecute domestic terrorism cases" and "federal law also provides many other appropriate alternatives.").

[510] *E.g.*, 18 U.S.C. § 1001(a) (providing an increased penalty for making false statements to the government in cases involving domestic or international terrorism). For a more detailed discussion of statutes that include heightened maximum sentences in cases involving terrorism, see *supra*, § "Statutes with Terrorism-Related Sentence Enhancement Provisions."

[511] U.S. SENT'G GUIDELINES MANUAL § 3A1.4 (U.S. SENT'G COMM'N 2018). For a more detailed discussion of the U.S. Sentencing Guidelines in terrorism-related cases, see *supra* § "Terrorism under the U.S. Sentencing Guidelines."

[512] U.S. SENT'G GUIDELINES MANUAL § 3A1.4(a), cmt. 1 (U.S. SENT'G COMM'N 2018).

[513] *See* Sinnar, *supra* note 4, at 1358 ("At the sentencing stage, the uneven coverage of federal terrorism law means that a severe federal sentencing enhancement disproportionately applies to cases with an international nexus.").

[514] *E.g.*, Michael German, *Why New Laws Aren't Needed to Take Domestic Terrorism More Seriously*, JUST SECURITY (Dec. 14, 2018), https://www.justsecurity.org/61876/laws-needed-domestic-terrorism/ (arguing that "it is often the case that it is easier to charge domestic terrorists using a variety of other federal laws."); Lisa Daniels, *Prosecuting Terrorism in State Court*, LAWFARE (Oct. 26, 2016, 11:33 am), https://www.lawfareblog.com/prosecuting-terrorism-state-court ("State terrorism prosecutions are extremely rare, despite the fact that at least 33 states passed sweeping anti-terrorism legislation in the wake of 9/11.").

[515] *See, e.g.*, U.S. CONST. amend. IV. The Fourth Amendment's limits on domestic surveillance are discussed below in more detail. *See infra*, § "Fourth Amendment."

[516] *E.g.*, Smith v. Maryland, 442 U.S. 735, 740 (1979) (holding that "the application of the Fourth Amendment depends

It is less clear whether or to what extent the Fourth Amendment applies to foreign surveillance; the Supreme Court has not addressed that issue and, in at least one case, has declined to do so.[517] Absent clear constitutional guidance, Congress has authorized several collection and surveillance procedures for foreign affairs and national security purposes that do not follow the Fourth Amendment warrant process. For example, the Foreign Intelligence Surveillance Act of 1978 (FISA),[518] as amended, provides a powerful set of tools to collect foreign intelligence information[519] through electronic surveillance,[520] physical searches,[521] access to specified business records,[522] and other means.[523] FISA requires a nexus to a foreign power or agent of a foreign power; it thus cannot be used to conduct purely domestic investigations.[524] Moreover, in contrast to the probable cause standard applicable to domestic surveillance (which requires investigators seeking a warrant to demonstrate "a fair probability" that contraband or evidence of crime will be found in a particular place[525]), investigators seeking a court order authorizing electronic

on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action"); United States v. Jones, 565 U.S. 400, 506-07 (2012) (reiterating that the Fourth Amendment safeguards against physical intrusions into constitutionally protected areas).

[517] *See* Carpenter v. United States, 138 S. Ct. 2206, 2220 (2018) (holding that obtaining an individual's cell phone location information was a search subject to the Fourth Amendment but declining to "consider other collection techniques involving foreign affairs or national security"). At least one lower court, however, has held that warrants are not always required for surveillance targeting "foreign powers or agents of foreign powers reasonably believed to be located outside the United States." In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1012 (FISA Ct. Rev. 2008).

[518] Foreign Intelligence Surveillance Act of 1978, P.L. 95-511, 92 Stat. 1783, codified as amended at 50 U.S.C. ch. 36. Congress passed several major amendments to FISA in the wake of the September 11, 2001, terrorist attacks, including the USA PATRIOT Act, which was designed, in part, to "provid[e] enhanced investigative tools" to "assist in the prevention of future terrorist activities and the preliminary acts and crimes which further such activities." Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, P.L. 107-56, tit. II, 115 Stat. 272, 278; H.Rept. 107-231, pt. 1, at 41. For information on these amendments, including several authorities that recently lapsed, see CRS Report R40138, *Origins and Impact of the Foreign Intelligence Surveillance Act (FISA) Provisions That Expired on March 15, 2020*, by Edward C. Liu.

[519] FISA defines *foreign intelligence information* as:

> (1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect itself against—
>
> (A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
>
> (B) sabotage, international terrorism, or the international proliferation of weapons of mass destruction by a foreign power or an agent of a foreign power; or
>
> (C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or
>
> (2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to—
>
> (A) the national defense or the security of the United States; or
>
> (B) the conduct of the foreign affairs of the United States.

50 U.S.C. § 1801(e).

[520] *See id.* §§ 1801-12.

[521] *See id.* §§ 1821-29.

[522] *See id.* §§ 1861-62.

[523] *See id.* §§ 1841-46.

[524] *See id.* § 1801(b) (defining *agent of a foreign power* as "any person other than a United States person" who engages in specified activities), (e) (defining *foreign intelligence information*).

[525] Illinois v. Gates, 462 U.S. 213, 238 (1983).

surveillance under FISA need not assert that the evidence sought relates to a crime, only that it satisfies FISA's foreign nexus requirement.[526]

Despite these differences, some commentators argue that, outside of FISA, federal investigative tools "do not distinguish as sharply between domestic and international terrorism."[527] Similarly, other scholars argue that "a multitude of existing laws already allow the federal government to formally *investigate* [domestic] attacks as domestic terrorism, even if those crimes are eventually *prosecuted* as murders, hate crimes or something else."[528]

Need for a Separate Domestic Terrorism Law

A number of scholars argue that the distinction between domestic terrorism and international terrorism in current law results in disproportionate prosecution and sentencing of international terrorism offenses.[529] These scholars disagree, however, on whether a new domestic terrorism law is necessary to cure this disparity.

Some commentators opposed to a new domestic terrorism law argue that "pleas for a new domestic terrorism statute are misplaced," as the Department of Justice "has robust authority to prosecute domestic terrorism . . . [but] simply chooses not to prioritize these cases as a matter of policy and practice."[530] Likewise, other scholars argue that "calls to 'ratchet up' [domestic] terrorism law ignore the potential liberty and equality costs of doing so," including "concerns over free speech and privacy."[531] In addition, several scholars have voiced concerns that "increasing federal authority will, most likely, only lead to additional disparities affecting minorities and disfavored political groups within the United States."[532]

In contrast, some commentators argue that, although existing "state law can ensure just punishment for domestic terrorism," the creation of a separate federal domestic terrorism offense would "recognize domestic terrorism for what it is: the moral equivalent of international terrorism."[533] Similarly, some argue that creating a federal domestic terrorism offense "would

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[526] 50 U.S.C. § 1804(a)(3) (applications for an order approving electronic surveillance must include, among other requirements, "a statement of facts and circumstances relied upon by the applicant to justify his belief that" a foreign nexus exists).

[527] Sinnar, *supra* note 4, at 1350 (citing terrorist watch lists and Department of Justice investigation guidelines as examples).

[528] Harsha Panduranga & Faiza Patel, *"Domestic Terrorism" Bills Create More Problems Than They Solve*, JUST SECURITY (Aug. 28, 2019), https://www.justsecurity.org/65998/domestic-terrorism-bills-create-more-problems-than-they-solve/.

[529] *See* Sinnar, *supra* note 4. at 1364 ("The domestic-international legal binary affects how government officials understand and characterize political violence . . . . For example, government officials say they hesitate to describe domestic cases as terrorism where explicit federal terrorism charges are not available."); Francesca Laguardia, *Considering a Domestic Terrorism Statute and Its Alternatives*, 114 N.W. U. L. REV. 1061, 1075 (2020) ("The current statutory scheme limits prosecution of modern terrorism, but then broadens it again in international (but not domestic) cases."); Courtney Kurz, *Closing the Gap: Eliminating the Distinction Between Domestic and International Terrorism Under Federal Law*, 93 TEMP. L. REV. 115, 116 (2020) ("Under federal law, acts of international terrorism are currently treated more seriously and punished more harshly than similar acts of a domestic nature.").

[530] GERMAN & ROBINSON, *supra* note 21, at 5.

[531] Sinnar, *supra* note 4, at 1399-4000.

[532] *Laguardia*, *supra* note 529, at 1077.

[533] Mary B. McCord, *Criminal Law Should Treat Domestic Terrorism as the Moral Equivalent of International Terrorism*, LAWFARE (Aug. 21, 2017, 1:59 pm), https://www.lawfareblog.com/criminal-law-should-treat-domestic-terrorism-moral-equivalent-international-terrorism.

lead federal law enforcement to devote more resources to investigating" acts of domestic terror[534] and "counter the widespread but incorrect notion that the federal government does not care about domestic terrorism."[535]

Constitutional Issues

Criminal laws often raise constitutional issues, and the laws governing terrorism—both domestic and international—are no exception. The nature of terrorism presents several constitutional questions with respect to potential criminal and surveillance laws.[536] For example, whether Congress can outlaw acts of domestic terrorism depends, in part, on whether the Constitution authorizes it to do so or reserves that power for the states.[537] Likewise, commentators have recognized a tension between the desire to regulate terrorist speech and the Constitution's First Amendment right to free speech.[538] Further, domestic surveillance of terrorist activities implicates the Fourth Amendment's right to freedom from unreasonable searches and seizures.[539] This section summarizes three broad constitutional issues—federalism, First Amendment rights, and Fourth Amendment rights—and discusses how these constitutional provisions may affect domestic terrorism offenses and surveillance, including terrorism-related cyber activities.

Federalism

The Constitution "establishes a system of dual sovereignty between States and the Federal Government," under which "states retain substantial sovereign authority."[540] Principles of *federalism* delineate the boundaries between federal and state power.[541] Recognizing that one such boundary concerns Congress's ability to enact criminal laws, the Supreme Court has stated: "The States possess primary authority for defining and enforcing the criminal law."[542] Congress is

[534] Samantha Michaels, *Why So Many Violent White Supremacists Aren't Charged with Domestic Terror*, MOTHER JONES (Apr. 26, 2019), https://www.motherjones.com/crime-justice/2019/04/why-so-many-violent-white-supremacists-arent-charged-with-domestic-terrorism/.

[535] Mary B. McCord, *It's Time for Congress to Make Domestic Terrorism a Federal Crime*, LAWFARE (Dec. 5, 2018, 9:13 am), https://www.lawfareblog.com/its-time-congress-make-domestic-terrorism-federal-crime.

[536] *See* United States v. U.S. Dist. Ct. (*Keith*), 407 U.S. 297, 313 (1972) ("National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech.").

[537] *See, e.g.*, Torres v. Lynch, 136 S. Ct. 1619, 1624 (2016) (reiterating that "'Congress cannot punish felonies generally'" and instead "may enact only those criminal laws that are connected to one of its constitutionally enumerated powers" (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428 (1821)).

[538] *See, e.g.*, Michael Posner & Ryan Goodman, *Terrorism and Other Dangerous Online Content: Exporting the First Amendment?*, JUST SECURITY (Mar. 26, 2021), https://www.justsecurity.org/75514/terrorism-and-other-dangerous-online-content-exporting-the-first-amendment/ (discussing the United States' reservation on First Amendment grounds to Article 20 of the International Covenant on Civil and Political Rights (ICCPR), which otherwise requires signatories to prohibit "'any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.'" (quoting ICCPR art. 20, Dec. 16, 1966, 999 U.N.T.S. 171)).

[539] U.S. CONST. amend. IV.

[540] Gregory v. Ashcroft, 501 U.S. 452, 457 (1991); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[541] *Federalism*, BLACK'S LAW DICTIONARY (11th ed. 2019). For a more detailed discussion of federalism principles, see CRS Report R45323, *Federalism-Based Limitations on Congressional Power: An Overview*, coordinated by Andrew Nolan and Kevin M. Lewis.

[542] Engle v. Isaac, 456 U.S. 107, 128 (1982).

not free to enact whatever criminal laws it wishes; it "may enact only those criminal laws that are connected to one of its constitutionally enumerated powers."[543]

As the Supreme Court explained in *Torres v. Lynch*:

> As a result, most federal offenses include, in addition to substantive elements, a jurisdictional one, like [an] interstate commerce requirement . . . . The substantive elements "primarily define[] the behavior that the statute calls a 'violation' of federal law," . . . [while] [t]he jurisdictional element, by contrast, ties the substantive offense . . . to one of Congress's constitutional powers[,] . . . thus spelling out the warrant for Congress to legislate.[544]

In other words, "Congress cannot punish felonies generally"[545] but instead must tie federal criminal laws to a specific grant of congressional authority—a jurisdictional "hook."[546]

In the international terrorism context, Congress has cited several of its constitutional powers to serve as jurisdictional hooks, including the powers: (1) to punish crimes against the laws of nations; (2) to carry out the treaty obligations of the United States; (3) over immigration and naturalization; and (4) over interstate and foreign commerce.[547] For example, 18 U.S.C. § 2332b, which prohibits acts of terrorism transcending national boundaries, lists six jurisdictional bases:

> (A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense;
>
> (B) the offense obstructs, delays, or affects interstate or foreign commerce, or would have so obstructed, delayed, or affected interstate or foreign commerce if the offense had been consummated;
>
> (C) the victim, or intended victim, is the United States Government, a member of the uniformed services, or any official, officer, employee, or agent of the legislative, executive, or judicial branches, or of any department or agency, of the United States;
>
> (D) the structure, conveyance, or other real or personal property is, in whole or in part, owned, possessed, or leased to the United States, or any department or agency of the United States;
>
> (E) the offense is committed in the territorial sea (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon) of the United States; or
>
> (F) the offense is committed within the special maritime and territorial jurisdiction of the United States.[548]

Should Congress decide to create a new domestic terrorism criminal law, it will need to consider the constitutional basis—the jurisdictional hook—for such a law. Absent such a hook, a reviewing court could find that Congress lacked congressional authority to prohibit the offense.

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[543] Torres v. Lynch, 136 S. Ct. 1619, 1624 (2016).

[544] *Torres*, 136 S. Ct. at 1624 (quoting Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9, 18 (2006)).

[545] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428 (1821).

[546] *Torres*, 136 S. Ct. at 1625.

[547] Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132, § 301(a), 110 Stat. 1214, 1247.; *see* U.S. CONST. art. I, § 8, cl. 3 (the power to regulate interstate and foreign commerce), cl. 4 (the power over immigration), cl. 10 (power to define and punish offenses against the law of nations), cl. 18 (the "necessary and proper" clause); *id.* art. 2, § 2, cl. 2 (the treaty power).

[548] 18 U.S.C. § 2332b(b)(1).

The First Amendment

The First Amendment to the Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[549] In light of its ideological nature, terrorism implicates the First Amendment in unique ways.[550] This section provides a brief legal background on two of these First Amendment rights—freedom of speech and freedom of association—before analyzing how these rights may affect domestic terrorism laws in the context of material support, generally, and Internet speech in particular.

Freedom of Speech

The First Amendment generally prevents the government[551] from prohibiting speech because it disapproves of the ideas that speech expresses.[552] Courts presume that so-called *content-based* regulations—that is, laws that "target speech based on its communicative content"[553]—are unconstitutional.[554] If a law is content-based, the government can overcome the presumption of unconstitutionality by showing that the law: (1) furthers a compelling interest and (2) is narrowly tailored to achieve that interest.[555] This two-part test is called *strict scrutiny*.[556]

Although speech is generally protected under the First Amendment, the Supreme Court has long considered political and ideological speech to be at the amendment's core.[557] Political speech includes more than "the written or spoken word";[558] in some contexts, both money[559] and

[549] U.S. CONST. amend. I.

[550] *See, e.g.*, United States v. U.S. Dist. Ct. (*Keith*), 407 U.S. 297, 314 (1972) ("The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.").

[551] In addition to the federal government, to which the First Amendment directly applies, state governments are subject to the First Amendment through the Fourteenth Amendment. *E.g.* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

[552] R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992). For a more detailed discussion of the First Amendment's right to free speech, see CRS Report R45713, *Terrorism, Violent Extremism, and the Internet: Free Speech Considerations*, by Victoria L. Killion, and CRS Report R45650, *Free Speech and the Regulation of Social Media Content*, by Valerie C. Brannon.

[553] *Reed*, 576 U.S. at 163. Content-based restrictions apply to speech "because of the topic discussed or the idea or message expressed." *Id.* Content-based restrictions fall into two categories: (1) laws that, on their face, draw distinctions based on a speaker's message, and (2) laws that, while "facially content-neutral . . . cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* at 164 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[554] *Id.*; *R.A.V.*, 505 U.S. at 382 ("Content-based regulations are presumptively invalid.").

[555] *Reed*, 576 U.S. at 171.

[556] *Id.*

[557] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .").

[558] Texas v. Johnson, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word.").

[559] Buckley v. Valeo, 424 U.S. 1, 19 (1976) ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.").

symbolic acts[560] can constitute political speech. Content-based laws regulating political speech, like laws regulating other protected speech, are subject to strict scrutiny.

There are several exceptions to the strict scrutiny test. In cases where laws are *content-neutral*—that is, the laws are not content-based because they are "'justified without reference to the content of the regulated speech,'" courts apply a lower standard of review.[561] Under this test, called *intermediate scrutiny*, the government must show that the challenged law is "narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels for communication of the information."[562] Frequently, content-neutral laws meeting the intermediate scrutiny test are said to "impose reasonable restrictions on the time, place, or manner of speech."[563]

The Supreme Court has also recognized limited categories of speech that the government can regulate *because* of its content, such as obscenity and defamation."[564] In these cases, the government can regulate these types of speech consistent with the First Amendment, provided it does so in an otherwise content-neutral way.[565] As the Supreme Court has recognized, "the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government."[566]

The Court has recognized three categories of speech the government may regulate because of content that are particularly relevant with respect to terrorism:

- ***Incitement***, meaning speech "directed to inciting or producing imminent lawless action and . . . likely to produce such action";[567]
- ***True threats***, which "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals";[568] and
- ***Speech integral to criminal conduct***, meaning speech "used as an integral part of conduct in violation of a valid criminal statute,"[569] such as conspiracy or solicitation to commit a crime.[570]

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[560] *Johnson*, 491 U.S. at 404 (recognizing that "conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments'" when "'[a]n intent to convey a particularized message was present, and . . . the likelihood was great that the message would be understood by those who viewed it'" (quoting Spence v. Washington, 418 U.S. 405, 409-11 (1974))).

[561] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)). A law regulating speech can be content neutral "even if it has an incidental effect on some speakers but not others." *Id.* (citing Reston v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986)).

[562] *Cmty. for Creative Non-Violence*, 468 U.S. at 293.

[563] *Rock Against Racism*, 491 U.S. at 791.

[564] R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992). For an overview of these categories, see CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion.

[565] *R.A.V.*, 505 U.S. at 383-84.

[566] *Id.* at 384.

[567] Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969).

[568] Virginia v. Black, 538 U.S. 343, 359 (2003). True threats do not include "political hyperbole." Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam). The government may regulate threats of violence to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388.

[569] Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

[570] *See* United States v. Williams, 553 U.S. 285, 297-98 (2008).

Freedom of Association

Although not specifically listed in the First Amendment, the Supreme Court has long recognized "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[571] This "implicit" right is premised on the idea that an individual's enumerated First Amendment rights "could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed," and it includes "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, education, religious, and cultural ends."[572] Government conduct may impermissibly infringe on this right in a number of ways, including: (1) imposing penalties or withholding benefits from individuals who are members of a disfavored group;[573] (2) requiring disclosure of the membership rolls of groups seeking anonymity;[574] and (3) interfering with the internal organization or affairs of a group.[575] Courts typically apply free speech case law to determine whether a law violates the right to free association.[576]

Material Support of Terrorism

In the context of terrorism, courts have considered the intersection of the freedoms of speech and association with prohibitions on material support to terrorist organizations. In *Holder v. Humanitarian Law Project*, the Supreme Court considered a First Amendment challenge to 18 U.S.C. § 2339B, which prohibits providing material support or resources to designated foreign terrorist organizations.[577] The plaintiffs in that case—two U.S. citizens and six domestic organizations, including the Humanitarian Law Project—"claimed that they wished to provide support for the humanitarian and political activities" of two designated foreign terrorist organizations "in the form of monetary aid, other tangible aid, legal training, and political advocacy."[578] The plaintiffs argued that, through Section 2339B, Congress violated their First Amendment rights to free speech and association by banning "pure political speech."[579]

The Court rejected this categorical argument, holding that because the plaintiffs were free to engage in independent advocacy and expression regarding the organizations and could even join those organizations without violating Section 2339B, Congress had not prohibited pure political

[571] Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984); *see id.* (distinguishing this "freedom of expressive association" from the "freedom of intimate association").

[572] *Id.* at 622 (citing, e.g., Citizens Against Rent Control/Coal. for Fair Housing v. Berkeley, 454 U.S. 290, 294 (1981)).

[573] *E.g.* Healy v. James, 408 U.S. 169, 180-84 (1972).

[574] *E.g.* Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87, 91-92 (1982).

[575] *E.g.*, Cousins v. Wigoda, 419 U.S. 477, 487-88 (1975); *U.S. Jaycees*, 468 U.S. at 623.

[576] *Compare U.S. Jaycees*, 468 U.S. at 623 ("Infringements on [the right to associate for expressive purposes] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."), *with* Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015) (a content-based restriction on speech is unconstitutional unless it "furthers a compelling governmental interest and is narrowly tailored to that end"); *see also* Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 982-95 (2011) (tracing the links in case law between freedom of speech and freedom of association).

[577] 561 U.S. 1 (2010); *see supra*, § "Material Support to Foreign Terrorist Organizations Under 18 U.S.C. § 2339B."

[578] *Humanitarian L. Project*, 561 U.S. at 10.

[579] *Id.* at 25.

speech.[580] Instead, the Court considered a "more refined" question of whether the government may prohibit material support "in the form of speech."[581] The Court concluded:

> At bottom, plaintiffs simply disagree with the considered judgment of Congress and the Executive that providing material support to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization. That judgment, however, is entitled to significant weight, and we have persuasive evidence before us to sustain it. Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that, to serve the Government's interest in preventing terrorism, it was necessary to prohibit providing material support in the form of training, expert advice, personnel, and services to foreign terrorist groups, even if the supporters meant to promote only the groups' nonviolent ends.[582]

The Court cautioned, however, that its holding "is not to say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny. It is also not to say that any other statute relating to speech and terrorism would satisfy the First Amendment."[583]

The Court's decision in *Humanitarian Law Project* highlights some of the First Amendment implications of anti-terrorism laws, particularly with respect to the way lawful advocacy, ideology, and protest intersect with unlawful terrorist acts. If Congress decides to pass a law prohibiting material support of domestic terrorism, it may face consideration of whether and how such a law adequately safeguards the rights to free speech and association.[584]

Terrorist Speech and the Internet

Another First Amendment concern comes through the increased use of the internet and social media to further terrorism.[585] As domestic terrorist organizations expand their use of the internet to recruit, train, and incite members to violence, Congress has considered legislation that would create individual user or service provider liability for certain types of domestic terrorism speech.[586] Theoretically, however, a law addressing this topic could raise First Amendment issues.

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[580] *Id.* at 25-26. In support of this holding, the Court relied on the statute's explicit inapplicability to "[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives," 18 U.S.C. § 2339B(h), and guidance that it not be "construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment," *id.* § 2339B(i), "find[ing] it significant that Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns." *Humanitarian L. Project*, 561 U.S. at 35-36.

[581] *Humanitarian L. Project*, 561 U.S. at 28. The Court explained that, while material support "most often does not take the form of speech at all[,] . . . when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations." *Id.* at 26.

[582] *Id.* at 36.

[583] *Id.* at 39.

[584] *See id.* at 39 ("We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations."); David Cole, *The First Amendment's Borders: The Place of* Holder v. Humanitarian Law Project *in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147 (2012).

[585] *See, e.g.*, Robert O'Harrow Jr. et al., *The Rise of Domestic Extremism in America*, WASH. POST (Apr. 12, 2021), https://www.washingtonpost.com/investigations/interactive/2021/domestic-terrorism-data/ ("[E]xtremists have exploited social media and the Internet in recent years to share theories, along with grievances, tactics, and potential targets.").

[586] Several bills imposing new content moderation requirements on social media companies were introduced during the 116th Congress. *See* Online Terrorism Prevention Act, H.R. 9043, 116th Cong. (2020); Raising the Bar Act of 2019,

For example, Congress likely could not prohibit all speech associated with terrorism. Such a restriction would be content-based, and therefore subject to strict scrutiny[587]—a test that often is "strict in theory, but fatal in fact."[588] In addition, a law broadly proscribing speech related to terrorism likely would not fall within one of the narrow exceptions for incitement, true threats, or speech integral to criminal conduct.[589] Congress likely could, however, more narrowly tailor a law to apply only to those categories of speech, particularly given the domestic security issues at stake.

Fourth Amendment

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[590]

Under the Fourth Amendment, a *search* is a government intrusion on an individual's reasonable expectation of privacy[591] or a physical intrusion into a constitutionally protected area.[592]

If a government action constitutes a search, then the Fourth Amendment generally requires the government to demonstrate "probable cause" and obtain a warrant before executing the search. "[T]he Supreme Court has interpreted the warrant clause of the Fourth Amendment to require three elements."[593]

> First, warrants must be issued by neutral, disinterested magistrates. Second, those seeking the warrant must demonstrate to the magistrate their probable cause to believe that "the evidence sought will aid in a particular apprehension or conviction" for a particular offense. Finally, "warrants must particularly describe the 'things to be seized,'" as well as the place to be searched.[594]

H.R. 5209, 116th Cong. (2019). This section focuses on laws regulating individual speech. For a discussion regarding the regulation of social media providers, see CRS Report R45650, *Free Speech and the Regulation of Social Media Content*, by Valerie C. Brannon.

[587] *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

[588] Fullilove v. Klutznick, 448 U.S. 448, 508 (1980) (Powell, J., concurring) (describing strict scrutiny as "virtually impossible to satisfy").

[589] *See supra*, § "Freedom of Speech."

[590] U.S. CONST. amend. IV. For a more detailed discussion of the Fourth Amendment in the context of terrorism surveillance, see CRS Report R40138, *Origins and Impact of the Foreign Intelligence Surveillance Act (FISA) Provisions That Expired on March 15, 2020*, by Edward C. Liu, and CRS Report R46541, *Facial Recognition Technology and Law Enforcement: Select Constitutional Considerations*, by Kelsey Y. Santamaria.

[591] The Supreme Court has recognized that "whether or not a Fourth Amendment 'search' has occurred is not [a] simple [question.]" Kyllo v. United States, 533 U.S. 27, 31 (2001). "The touchstone of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" California v. Ciraolo, 476 U.S. 207, 211 (1986) (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). This test is a two-part inquiry: (1) "has the individual manifested a subjective expectation of privacy in the object of the challenged search," and (2) "is society willing to recognize that expectation as reasonable?" *Id.* (citing Smith v. Maryland, 442 U.S. 735, 740 (1979)). If both inquiries are satisfied, then a government intrusion on that reasonable expectation of privacy constitutes a Fourth Amendment search. *Id.*

[592] *See* United States v. Jones, 565 U.S. 400, 506-07 (2012) (recognizing that "*Katz* did not repudiate" the understanding that such government conduct constitutes a search).

[593] *In re* Sealed Case, 310 F.3d 717, 738 (FISA Ct. Rev. 2002).

[594] Dalia v. United States, 441 U.S. 238, 255 (1979) (citations omitted).

There are several exceptions to the warrant requirement. As potentially relevant to acts of domestic terrorism, the Supreme Court has recognized an exception to the warrant requirement "when 'the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'"[595] Likewise, the Court has recognized an exception "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirements impracticable."[596] Although the Supreme Court has not directly addressed whether a warrant is required to collect foreign intelligence,[597] at least one court, applying the "special needs" doctrine, has held that a warrant is not required to do so.[598]

Application to Domestic Terrorism Surveillance

Congress may consider whether and how any new domestic terrorism legislation implicates Fourth Amendment concerns. In contrast to foreign intelligence collection, the government generally must obtain a warrant to conduct domestic surveillance.[599] In this vein, the Supreme Court has held that the following types of conduct, among others, constitute a Fourth Amendment search: (1) recording the contents of telephone calls made from public telephone booths;[600] (2) conducting electronic surveillance of domestic organizations on national security grounds;[601] and (3) placing a GPS tracker on a private vehicle.[602]

General Fourth Amendment principles also apply in the context of cyber activities, such as internet speech: where U.S. persons have a reasonable expectation of privacy in online activities, the Fourth Amendment will likely require the government to show probable cause and obtain a warrant before conducting a search.[603] The Supreme Court has held that warrants are required to search the contents of an individual's cell phone[604] and to request a user's cell phone location data from a service provider.[605] Likewise, the Sixth Circuit has held that users enjoy "a reasonable

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[595] Kentucky v. King, 563 U.S. 452, 460 (2011) (quoting Mincey v. Arizona, 437 U.S. 385, 394 (1978)).

[596] Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (internal quotation marks omitted).

[597] *See, e.g.*, United States v. U.S. Dist. Ct. (*Keith*), 407 U.S. 297, 321-22 (1972) ("We have not addressed[, a]nd express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.")

[598] In re Directives Pursuant to Section 105B of Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1012 (FISA Ct. Rev. 2008) ("[W]e hold that a foreign intelligence exception to the Fourth Amendment's warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States."). The FISA Court of Review cautioned, however, that its holding "does not give the government carte blanche: even though the foreign intelligence exception applies in a given case, governmental action intruding on individual privacy interests must comport with the Fourth Amendment's reasonableness requirement." *Id.*

[599] *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2214 (2018) (recognizing that "a central aim of the Framers [when adopting the Fourth Amendment] was 'to place obstacles in the way of a too permeating police surveillance'" (quoting United States v. Di Re, 332 U.S. 581, 595 (1948))); *Keith*, 407 U.S. at 321 (holding that the government's national security "concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance"). As the Court recognized in *Keith*, "[a]lthough some added burden will be imposed upon the Attorney General" by requiring a warrant for domestic surveillance, "this inconvenience is justified in a free society to protect constitutional values." 407 U.S. at 321.

[600] Katz v. United States, 389 U.S. 347, 358-59 (1967).

[601] *Keith*, 407 U.S. at 323-24.

[602] United States v. Jones, 565 U.S. 400, 404 (2012).

[603] *See* California v. Ciraolo, 476 U.S. 207, 211 (1986).

[604] Riley v. California, 573 U.S. 373, 401 (2014).

[605] Carpenter v. United States, 138 S. Ct. 2206, 2223 (2018).

expectation of privacy in the contents of emails 'that are stored with, or sent through, a commercial [internet service provider].'"[606]

Domestic terrorist organizations increasingly use the internet and other cyber tools—such as social media posts, email, and text messages—to recruit, train, and coordinate members.[607] When conducting surveillance of these activities, there may be some exceptions to general Fourth Amendment rules in cases involving exigent circumstances or special needs.[608] There is, however, "no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated."[609] Thus, Congress likely could not create a blanket exception to the Fourth Amendment for cases involving domestic terrorism.

Legislative Proposals

This section summarizes domestic terrorism-related legislation introduced in the 116th and 117th Congresses.[610] These bills generally would adopt the definition of *domestic terrorism* in 18 U.S.C. § 2331, either in whole or with modifications, and would create new law enforcement resources or priorities. In addition, several of the bills would recognize a new criminal offense of domestic terrorism. **Table 1** compares the bills' treatment of four subjects: (1) the definition of *domestic terrorism* each bill would adopt; (2) whether the bill would create a new domestic terrorism criminal offense; (3) whether the bill would create new reporting requirements; and (4) whether the bill would create a new federal agency or office to address domestic terrorism.

117th Congress

Domestic Terrorism Prevention Act of 2021

The Domestic Terrorism Prevention Act of 2021 (DTPA2021), introduced as companion bills in the House of Representatives[611] and the Senate,[612] would create new offices in the Department of Homeland Security (DHS), Department of Justice (DOJ) National Security Division, and FBI to "monitor, analyze, investigate, and prosecute"[613] domestic terrorism. The bills would adopt 18 U.S.C. § 2331(5)'s definition *domestic terrorism*, excluding:

> acts perpetrated by individuals associated with or inspired by—
>
> (A) a foreign person or organization designated as a foreign terrorist organization under section 219 of the Immigration and Nationality Act (8 U.S.C. [§] 1189);

[606] United States v. Warshak, 631 F.3d 266, 288 (6th Cir. 2010).

[607] *See* O'Harrow, *supra* note 585.

[608] *See* Kentucky v. King, 563 U.S. 452, 460 (2011) (recognizing an exception to the warrant requirement in exigent circumstances); Griffin v. Wisconsin, 483 U.S. 868, 873 (1987).

[609] United States v. Jones, 565 U.S. 400, 412 (2012).

[610] CRS searched *Congress.gov* for bills—but not resolutions or amendments—whose titles, summaries, or text include the phrases "domestic terror" or "domestic terrorism." This report summarizes those bills that would: (1) establish new federal programs dedicated or relating to domestic terrorism; (2) modify the definition of domestic terrorism in 18 U.S.C. § 2331; or (3) create new federal crimes related to domestic terrorism. It excludes bills with either a narrower focus, like hate crimes or reference to specific events (such as the events of January 6, 2021, at the U.S. Capitol) or a broader focus, like programs to combat terrorism generally.

[611] DTPA 2021, H.R. 350, 117th Cong. (2021).

[612] DTPA 2021, S. 964, 117th Cong. (2021).

[613] *Id.* § 3(a).

> (B) an individual or organization designated under Executive Order 13224 (50 U.S.C. [§] 1701 note); or
>
> (C) a state sponsor of terrorism as determined by the Secretary of State under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. [§] 4605), section 40 of the Arms Control Export Act (22 U.S.C. [§] 2780), or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. [§] 2371).[614]

The bill would also create new reporting, training, and inter-agency coordination requirements.[615]

Domestic Terrorism and Hate Crimes Prevention Act of 2021

The Domestic Terrorism and Hate Crimes Prevention Act of 2021[616] is substantially similar to DTPA2021, with one exception. In addition to domestic terrorism-related provisions that mirror DTPA2021, the bill would also require the Attorney General to undertake "expedited review" of hate crimes related to the spread of Coronavirus Disease 2019 (COVID-19).[617]

Commission on Domestic Terrorism Act of 2021

The Commission on Domestic Terrorism Act of 2021[618] would establish a new National Commission on Domestic Terrorism tasked with investigating the federal government's response to domestic terror.[619] Specifically, the Commission would: (1) examine the government's prior failures to respond to or prevent acts of domestic terrorism;[620] (2) "identify, review, and evaluate" lessons learned from domestic terrorism incidents;[621] and (3) submit initial and final reports containing its findings and recommendations.[622] The bill would adopt § 2331's definition of *domestic terrorism*.[623]

116th Congress

Domestic Terrorism Prevention Act of 2020

The Domestic Terrorism Prevention Act of 2020, introduced as companion bills in the House of Representatives[624] and the Senate,[625] was substantially similar to DTPA2021.

[614] *Id.* § 2(2).

[615] *Id.* §§ 3(b)-(c), 4, 5.

[616] Domestic Terrorism and Hate Crimes Prevention Act of 2021, S. 963, 117th Cong. (2021).

[617] *Id.* § 7.

[618] Commission on Domestic Terrorism Act of 2021, H.R. 1178, 117th Cong. (2021).

[619] *Id.* § 2.

[620] *Id.* § 5(1).

[621] *Id.* § 5(2).

[622] *Id.* § 11(a)-(b).

[623] *Id.* § 12.

[624] Domestic Terrorism Prevention Act of 2020, H.R. 5602, 116th Cong. (2020).

[625] Domestic Terrorism Prevention Act of 2020, S. 3190, 116th Cong. (2020).

Terrorism Reporting and Classifying Act of 2019

The Terrorism Reporting and Classifying Act of 2019[626] would have created an interagency working group to establish a standard definition of *domestic terrorism* and create and maintain a database of acts of domestic terrorism.[627] The bill would have required the working group to submit an annual report to Congress.[628] The bill would have adopted § 2331's definition of *domestic terrorism* but would have authorized agencies to refine this definition.[629]

Confronting the Threat of Domestic Terrorism Act

The Confronting the Threat of Domestic Terrorism Act[630] would have created a new domestic terrorism criminal offense, subject to the same penalties as terrorism transcending national boundaries under 18 U.S.C. § 2332b(c).[631] Specifically, the new criminal provision would have applied to any individual who,

> with the intent to intimidate or coerce a civilian population, influence the policy of government by intimidation or coercion, or affect the conduct of a government by mass destruction, assassination, or kidnapping—
>
> (A) knowingly kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United States; or
>
> (B) creates a substantial risk of serious bodily injury to any other person by knowingly destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States[.[632]]

It would also have applied to individuals who threatened, attempted, or conspired to commit such acts.[633] For the provision to apply, the individual must have committed the offense under one of eight circumstances giving rise to federal jurisdiction, such as travel across state lines or use of the mail.[634] In addition to its penal provisions, the bill would have required a report assessing those provisions' impact on civil rights.[635] The bill would not have expressly adopted a definition of *domestic terrorism*, but its language tracks with the current definition in § 2331(5).[636]

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[626] Terrorism Reporting and Clarifying Act of 2019, S. 3118, 116th Cong. (2019).

[627] *Id*. § 3(d).

[628] *Id*. § 5.

[629] *Id*. §§ 2(6), 3(d)(1).

[630] Confronting the Threat of Domestic Terrorism Act, H.R. 4192, 116th Cong. (2019).

[631] *Id*. sec. 2(a) (internal quotations removed).

[632] *Id*.

[633] *Id*.

[634] *Id*. The eight enumerated circumstances are offenses: (1) using the mail or a facility of interstate or foreign commerce in furtherance of the offense; (2) obstructing, delaying, or affecting interstate or foreign commerce; (3) traveling across state lines or national borders or using a facility of interstate or foreign commerce; (4) where the victim is the U.S. government, a member of the uniformed services, or an officer or employee of the U.S. government; (5) where the property affected is, in whole or in part, owned or leased by the United States; (6) employing a firearm, dangerous weapon, or weapon of mass destruction that has traveled in interstate or foreign commerce; (7) committed in the U.S. territorial sea; or (8) committed within the special maritime and territorial jurisdiction of the United States. *Id*. A *facility of interstate or foreign commerce* "includes means of transportation and communication." *Id.*; 18 U.S.C. § 1958(b)(2).

[635] H.R. 4192, § 2(e).

[636] *Compare id*. § 2(a) *with* 18 U.S.C. § 2331(5).

Domestic Terrorism Information Act of 2019

The Domestic Terrorism Information Act of 2019[637] would have required the Attorney General, within 180 days of enactment, to submit a report to Congress providing information on domestic terrorism. Specifically, the bill would have required the report to include: (1) the number of arrests by federal law enforcement "pursuant to an investigation of an act of domestic terrorism," including the results of those investigations and any charges filed;[638] (2) the number of individuals killed by domestic terrorism;[639] and (3) the DOJ's methods and strategies for preventing domestic terrorism.[640] The bill would have adopted § 2331's domestic terrorism definition.[641]

Domestic Terrorism Penalties Act of 2019

The Domestic Terrorism Penalties Act of 2019[642] would have recognized six criminal offenses as acts of domestic terrorism and defined penalties for them: (1) killing; (2) kidnapping; (3) assault with a deadly weapon; (4) assault resulting in serious bodily injury; (5) destruction of or damage to structures, conveyances, or other real or personal property; and (6) an attempt or conspiracy to commit one of the other offenses.[643] The new provisions would have applied only to individuals who committed one or more of these acts "with the intent to intimidate or coerce a civilian population or influence, affect, or retaliate against the policy or conduct of a government."[644] In addition, the new provisions would not have applied unless an individual acted in one of three circumstances giving rise to federal jurisdiction: (1) against any person or property within the United States in a manner employing or affecting interstate or foreign commerce; (2) against any property owned, leased, or used by the United States; or (3) against any property in the United States owned, leased, or used by a foreign government.[645]

Domestic and International Terrorism DATA Act

The Domestic and International Terrorism DATA Act would have required the Secretary of Homeland Security, the Attorney General, and the FBI Director to submit a joint report on domestic and international terrorism to Congress each of the six fiscal years after the bill's enactment.[646] The bill would also have required the Comptroller General to conduct an annual audit of the joint report.[647] In addition, the bill would have required the Homeland Security Secretary to submit a report to Congress discussing, among other things, connections between

[637] Domestic Terrorism Information Act of 2019, H.R. 4190, 116th Cong. (2019).

[638] *Id.* § 2(a)(1).

[639] *Id.* § 2(a)(2).

[640] *Id.* § 2(a)(3).

[641] *Id.* § 2(b).

[642] Domestic Terrorism Penalties Act of 2019, H.R. 4187, 116th Cong. (2019).

[643] *Id.* § 2(a).

[644] *Id.*

[645] *Id.*

[646] Domestic and International Terrorism DATA Act, H.R. 3106, 116th Cong. § 101 (2019).

[647] *Id.* § 102.

international and domestic terrorism and the use of online platforms for such terrorism.[648] The bill would have adopted § 2331's domestic terrorism definition.[649]

Domestic Terrorism Prevention Act of 2019

The Domestic Terrorism Prevention Act of 2019, introduced in both the House of Representatives[650] and the Senate,[651] was substantially similar to DTPA2021.

Table 1. Comparison of Domestic Terrorism Legislation

Bill	Definition of *Domestic Terrorism*	New Penal Provision	New Reporting Requirements	New Federal Agency or Office
117th Congress				
Domestic Terrorism Prevention Act of 2021, H.R. 350 and S. 964	18 U.S.C. § 2331(5), with exclusions (§ 2(2))	—	Biannual (§ 3(b))	Offices in DHS, DOJ, and FBI (§ 3(a))
Domestic Terrorism and Hate Crimes Prevention Act of 2021, S. 963	18 U.S.C. § 2331(5), with exclusions (§ 2(2))	—	Biannual (§ 3(b))	Offices in DHS, DOJ, and FBI (§ 3(a))
Commission on Domestic Terrorism Act of 2021, H.R. 1178	18 U.S.C. § 2331(5) (§ 12)	—	Periodic (§ 11(a)-(b))	Commission (§ 2)
116th Congress				
Domestic Terrorism Prevention Act of 2020, H.R. 5602 and S. 3190	18 U.S.C. § 2331(5), with exclusions (§ 3(2))	—	Biannual (§ 4(b))	Offices in DHS, DOJ, and FBI (§ 4(a))
Terrorism Reporting and Classifying Act of 2019, S. 3118	18 U.S.C. § 2331(5) (§ 2(6))	—	Annual (§ 5)	Interagency working group (§ 3)
Confronting the Threat of Domestic Terrorism Act, H.R. 4192	—	§ 2(a)	One-time (§ 2(e))	—
Domestic Terrorism Information Act of 2019, H.R. 4190	18 U.S.C. § 2331(5) (§ 2(b))	—	One-time (§ 2(a))	—
Domestic Terrorism Penalties Act of 2019, H.R. 4187	—	§ 2(a)	—	—
Domestic and International Terrorism DATA Act, H.R. 3106	18 U.S.C. § 2331(5) (§ 2(3))	—	Six annual reports (§ 101); annual (§ 201)	—

[648] *Id*. § 201.

[649] *Id*. § 2(3).

[650] Domestic Terrorism Prevention Act of 2019, H.R. 1931, 116th Cong. (2019).

[651] Domestic Terrorism Prevention Act of 2019, S. 894, 116th Cong. (2019).

Domestic Terrorism Prevention Act of 2019, H.R. 1931 and S. 894	18 U.S.C. § 2331(5), with exceptions (§ 3(2))	Biannual (§ 4(b))	Offices in DHS, DOJ, and FBI (§ 4(a))

Source: CRS, based on information from H.R. 350, S. 964, S. 963, and H.R. 1178 (117th Congress) and H.R. 5602, S. 3190, S. 3118, H.R. 4192, H.R. 4190, H.R. 4187, H.R. 3106, H.R. 1931, and S. 894.

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